SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 479

RISS AND COMPANY, INC., A CORPORATION,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil Action No. 6344

RISS & COMPANY, INC., a Corporation, 9th & Burlington Streets, North Kansas City, Missouri, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT—Filed May 2, 1950

This Court has jurisdiction of this action under §§ 205(g), 205(h) of the Interstate Commerce Act, 49 U. S. C. §§ 305(g), 305(h), and 28 U. S. C. §§ 1336, 1398, 2284, 2321-2325.

1. The plaintiff, Riss & Company, Inc., hereinafter referred to as "plaintiff" is a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal office at 9th & Burlington Streets, North Kansas City, Missouri. Plaintiff is a common carrier of general commodities by motor vehicle, subject to the provisions of Part II of the Interstate Commerce Act and holds certain certificates of public convenience and necessity issued by the Interstate Commerce Commission, hereinafter referred to as the "Commission", authorizing such transportation and is otherwise entitled under Part II of the Interstate Commerce Act to perform such service.

2. Plaintiff on or about August 22, 1947, filed an application with the Commission for certificates of public convenience and necessity to extend its operations as a common carrier of property by motor vehicle over certain regular and irregular routes. The plaintiff had for some time prior to August 22, 1947 performed the service for which application was made under temporary operating authorities [fol. 3] issued by the Commission pursuant to § 210(a) of Part II of the Interstate Commerce Act, 49 U. S. C. § 310(a). The application for certificates of public convenience and necessity was amended by plaintiff under date of September

3, 1947. The application, as amended, seeks certificates of public convenience and necessity authorizing extension of operations of plaintiff to certain designated points beyond plaintiff's presently authorized routes and points of service; authorizing the transportation of dangerous explosives to, from and/or between all points and places presently authorized to be served by plaintiff in the transportation of general commodities; and authorizing the transportation of explosives and other dangerous articles over irregular routes between designated points. The Commission assigned Docket No. MC-200 (Sub No. 84) to plaintiff's application.

3. The application by orders of the Commission was assigned for hearing in Washington, D. C. before an examiner, hereinafter referred to as the "presiding officer". Copies of the orders of the Commission dated September 24, 1947 and October 13, 1947 are attached hereto and made a part hereof as Exhibits A and B, respectively.

4. In accordance with the orders of the Commission, hearings were conducted by the presiding officer on November 5, 6 and 7, 1947, and again on December 6 and 7, 1947. During these hearings, as well as those held in 1948, the Bureau of Motor Carriers of the Commission appeared as an intervenor in the proceeding in opposition to the issuance of certificates of public convenience and necessity to plaintiff. The Bureau of Motor Carriers of the Commission participated in the hearings in opposition to plaintiff's application and introduced evidence, both oral and documentary, relating to plaintiff's operations. Certain of plaintiff's competitors, both railroad and motor vehicle, also appeared in the proceedings as protestants to the issuance of certificates of public conveniences and necessity to plaintiff.

[fol. 4] 5. Further hearings on plaintiff's application were ordered by the Commission to be held before the same presiding officer on April 14, 1948 and were postponed by order of the Commission to May 19, 1948. Copies of these orders are attached hereto and made a part hereof as Exhibits C and D, respectively. The further hearings were held on May 19 and 20, 1948. During the hearing on May 20, 1948, plaintiff learned that the presiding officer was not an examiner appointed and qualified under section 11 of the Administrative Procedure Act, 5 U. S. C. § 1010, and was not otherwise qualified under section 7 of the Administrative Pro-

cedure Act to preside at hearings as required by the terms of that section. Plaintiff made prompt objection to the hearing as being contrary to and in violation of the provisions of sections 5, 7 and 8 of the Administrative Procedure Act, 5 U. S. C. §§ 1004, 1006-7. Plaintiff's objection was not ruled on at the hearing. All further proceedings were held over plaintiff's continued objection.

6. The presiding officer was at all times material hereto an employee of the Section of Complaints, Bureau of Motor Carriers of the Commission, and responsible to, and under the supervision of the chief of the Section of Complaints and the Director of the Bureau of Motor Carriers of the Commission, which Bureau was appearing at the hearing before the presiding officer, in opposition to plaintiff's application. The presiding officer at all times material hereto was not an examiner appointed and qualified under section 11 of the Administrative Procedure Act, nor was he otherwise qualified under section 7 of that Act to preside at hearings held in accordance with section 5 of that Act.

7. On June 28, 1948 plaintiff filed a petition before the Commission, requesting a hearing on its application for certificates of public convenience and necessity in accordance with the requirements of sections 5, 7 and 8 of the Administrative Procedure Act. By order of the Commission dated July 28, 1948 the Commission denied the petition of plaintiff for the sole reason that the "proceeding was not required by statute to be determined on the record after opportunity for agency hearings and, therefore, is not a case [fol. 5] of adjudication which is required by section 5 of the Administrative Procedure Act to be heard and decided in conformity with sections 7 and 8 of that act, and the provisions of sections 5, 7 and 8 of that act do not apply to said proceedings." A copy of this order of the Commission is attached hereto and made a part hereof as Exhibit E. Thereafter, on August 25, 1948 plaintiff filed a petition for reconsideration of the order of the Commission dated July 28, 1948. By order of the Commission dated September 7, 1948 this petition of plaintiff for reconsideration was denied. A copy of the order of September 7, 1948 is attached hereto and made a part herefore, as Exhibit F.

8. The presiding officer issued a report and order dated March 3, 1949 recommending that plaintiff's application be denied. Plaintiff filed exceptions to the recommended re-

port and order of the presiding officer, objecting to the proceeding as a violation of the rights secured to plaintiff by the Administrative Procedure Act.

9. The Commission, by Division 5, entered its order dated August 10, 1949, denying plaintiff's application in its entirety. A copy of this order is attached hereto and made a part hereof, as Exhibit G.

10. Plaintiff filed on December 5, 1949 with the Commission a petition for rehearing and reconsideration of the order of the Commission, by Division 5, and on February 27, 1950 a further petition for a hearing in accordance with the provisions of sections 5, 7 and 8 of the Administrative Procedure Act. The Commission by order dated April 19, 1950 denied plaintiff's petitions. The order of the Commission dated April 19, 1950 states in part: "That said petition filed February 27, 1950, be, and it is hereby, denied, for the reason that sections 5, 7 and 8 of the Administrative Procedure Act do not apply to this proceeding." A copy of the order of the Commission dated April 19, 1950 is attached hereto and made a part hereof, as Exhibit H.

11. The determination by the Commission of applications for certificates of public convenience and necessity to operate as a common carrier by motor vehicle under Part II of the Interstate Commerce Act are adjudications required by statute to be made upon the record after opportunity for [fol. 6] hearing before the Commission under section 5 of the Administrative Procedure Act. Plaintiff, accordingly, is entitled to hearing before the Commission and a decision by the Commission on its application for certificates of public convenience and necessity, pursuant to the requirements of sections 5, 7 and 8 of the Administrative Procedure Act. The proceedings heretofore held on plaintiff's applications before the Commission are wholly void and without authority of law. Plaintiff has exhausted its administrative remedies to secure the rights granted to it by the Administrative Procedure Act.

12. The findings of fact and conclusions of law contained in the order of the Commission upon which the denial of certificates of public convenience and necessity under § 207(a) of the Interstate Commerce Act, 49 U. S. C. § 307(a) purport to be based, are arbitrary, capricious, unsupported by the evidence and contrary to the evidence and violate the provisions of the Interstate Commerce Act applicable to plaintiff's application.

Wherefore, plaintiff prays that:

1. Process issue against the defendant, United States of America, and the defendant, Interstate Commerce Commission;

2. The Court, as soon as practicable after the filing of this Complaint, shall call to its assistance for hearing and determination of the issues, two other Judges, one of whom shall be a Circuit Judge as provided by 29 U. S. C. § 2284;

3. An order be issued by this Court enjoing, setting aside, annulling or suspending the order of the Commission, by Division 5, dated August 10, 1949, denying plaintiff's application for certificates of public con-
[fol. 7] venience and necessity and the order of the Commission dated April 19, 1950 denying plaintiff certificates of public convenience and necessity and a hearing on its application pursuant to §§ 5, 7 and 8 of the Administrative Procedure Act, 5 U. S. C. §§ 1004, 1006, 1007;

4. This Court grant plaintiff such other and further relief as may be lawful, just and proper in the premises.

John B. Gage, 1007 Bryant Building, Kansas City, Missouri, Attorney for Plaintiff.

Of Counsel: Wendell Berge.
A. Alvis Layne, Jr., Posner, Berge, Fox & Arent, 1002 Ring Building, Washington 6, D. C.

[fol. 8] EXHIBIT "A" TO COMPLAINT

Order

Interstate Commerce Commission

No. MC 200 Sub. 84

In this matter of the application of Riss & Company, Inc. (a Colorado corporation), 124 West 4th Street, Kansas City 6, Missouri, filed August 22, 1947, for authority to

operate as a common carrier, over regular and irregular routes:

Regular Routes:

General commodities, except those of unusual value, and except commodities in bulk, commodities requiring special equipment, and excepting livestock.

Between the junction of U. S. Highway No. 69 and Kansas Highway No. 26 near Cresline, Kansas, over Kansas Highway No. 26 to junction unnamed county thence over unnamed county road to the site of the Jayhawk Anhydrous Ammonia and Ammonium Nitrate Plant; and

Between the junction of U. S. Highway No. 66 and Kansas Highway 26 near Riverton, Kansas, over Kansas Highway No. 26 to junction unnamed county road, thence over unnamed county road to the site of said plant.

Serving *no* intermediate points.

General commodities, except livestock,

To and from the U. S. Army Air Depot near Marion, Okla.; Camp Carson near Colorado Springs, Colo.; Topeka Air Base, approximately five miles south of Topeka, Kans.; and the Pueblo Ordnance Depot, approximately six miles from Pueblo, Colo., as off-route points in connection with applicant's presently authorized operations to and from Oklahoma City, Okla., Colorado Springs, Colo., Topeka, Kansas, and Pueblo, Colo., respectively.

General commodities, except those of unusual value, and except commodities in bulk, those requiring special equipment, and excepting livestock.

Between Kansas City, Mo.-Kans., and Lawrence, Kans., as follows:

From Kansas City, Mo.-Kans., over Kansas Highway No. 10 to junction U. S. Highway No. 59, thence over U. S. Highway No. 59 to Lawrence, Kans., serving the Sunflower Ordnance Works, as an intermediate point.

General commodities, except those of unusual value, commodities in bulk, those requiring special equipment and *excepting livestock* in service of the Pan-Tex Ordnance Works near Armarillo, Texas, as an off-route point in connection with presently authorized operations to and from Amarillo, Texas.

Dangerous explosives and *ordnance supplies.*

To, from, and/or between points and places which applicant is presently authorized to serve in connection with operations over regular routes and irregular routes in the States of Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Virginia, Rhode Island, Texas, and West Virginia.

General commodities, except those of unusual value, and except commodities in bulk, those requiring special equipment and except livestock and household goods in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467.

[fol. 9] From Cornhusker Ordnance Works near Grand Island, Nebr., as an off-route point in connection with applicant's presently authorized operations.

Irregular Routes:

Explosives, ordnance stores, ammunition and *dangerous articles.*

Between Crane, Ind., on the one hand, and, on the other, the Naval Mine Depot, Yorktown, Va., the Navy Ammunition Depot, St. Julien's Creek, Portsmouth, Va., the Naval Air Station, Norfolk, Va., and Earle, N. J., near Fort Monmouth, N. J.

A more detailed statement of route or routes (or territory) is contained in said application, copies of which are on file and may be inspected at the office of the Interstate Commerce Commission, Washington, D. C., or offices of the boards, commissions, or officials of the States involved in this application.

Present: William E. Lee, Commissioner, to whom the matters which are the subject of this order have been assigned for action thereon.

It appearing, That the above-entitled matter is one which the Commission is authorized by the Interstate Commerce Act, to refer to an examiner:

It is ordered, That the above-entitled matter be, and it is hereby, referred to Examiner Harold P. Boss for hearing on the 5th day of November, A. D., 1947, at 9:30 o'clock a. m., United States standard time at the Interstate Commerce Commission, Washington, D. C., and for the recommendation of an appropriate order thereon accompanied by the reasons therefor;

It is further ordered, That applicant shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in the application;

It is further ordered, That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted;

It is further ordered, That notice of this proceeding be duly given;

And it is further ordered, That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Interstate Commerce Commission, Washington, D. C., to that effect by notice which must reach the Commission within ten days from the date of service hereof and that the date of mailing of this order shall be considered as the time when the order is served.

Dated at Washington, D. C., this 24th day of September, A. D., 1947.

By the Commission, Commissioner Lee. W. P. Bartel, Secretary. (Seal.)

[fol. 10] EXHIBIT "B" TO COMPLAINT

Order

Interstate Commerce Commission

No. MC 200 Sub 84

In the matter of the application, as amended, of Riss & Company, Inc., (a Colorado corporation), 124 West 4th Street, Kansas City 6, Missouri, filed August 22, 1947, for authority to operate as a comomn carrier, over regular and irregular routes:

Regular Routes:

General commodities, except those of unusual value, and except commodities in bulk, commodities requiring special equipment, and excepting livestock.

Between the junction of U. S. Highway No. 69 and Kansas Highway No. 26 near Cresline, Kans., over Kansas Highway No. 26 to junction unnamed county road, thence over unnamed county road to the site of the Jayhawk Anhydrous Ammonia and Ammonium Nitrate Plant; and,

Between the junction of U. S. Highway No. 66 and Kansas Highway No. 26 near Riverton, Kans., over Kansas Highway No. 26 to the junction unnamed county road, thence over unnamed county road to the site of said plant,

Serving *no* intermediate points.

General commodities, except livestock,

To and from the U. S. Army Air Depot near Marion, Okla.; Camp Carson near Colorado Springs, Colo.; Topeka Air Base, approximately five miles south of Topeka, Kans., and the Pueblo Ordnance Depot, approximately six miles from Pueblo, Okla., as off-route points in connection with applicant's presently authorized operations to and from Oklahoma City, Okla., Colorado Springs, Colo., Topeka, Kans., and Pueblo, Colo., respectively.

General commodities, except those of unusual value, and except commodities in bulk, those requiring special equipment, and excepting livestock.

Between Kansas City, Mo.-Kans., and Lawrence, Kans., as follows:

From Kansas City, Mo.-Kans., over Kansas Highway No. 10 to junction U. S. Highway No. 59, thence over U. S. Highway No. 59 to Lawrence, Kans., serving the Sunflower Ordnance Works as an intermediate point.

General commodities, except those of unusual value, commodities in bulk, those requiring special equipment and *excepting livestock* in service of the Pan-Tex Ordnance Works near Amarillo, Texas, as an off-route point in connection with presently authorized operations to and from Amarillo, Texas.

Dangerous explosives and ordnance supplies,

To, from, and/or between points and places which applicant is presently authorized to serve in connection with operations over regular routes and irregular routes in the States of Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Virginia, Rhode Island, Texas, and West Virginia.

General commodities, except those of unusual value, and except commodities in bulk, those requiring special equipment and except livestock and household goods as defined [fol. 11] in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

To and from Cornhusker Ordnance Works near Grand Island, Nebr., as an off-route point in connection with applicant's presently authorized operations.

Irregular Routes:

Explosives, ordnance stores, ammunition and *dangerous articles,*

Between Crane, Ind., on the one hand, and, on the other, the Naval Mine Depot, Yorktown, Va., the Navy

Ammunition Depot, St. Julien's Creek, Portsmouth, Va., the Naval Air Station, Norfolk, Va., and Earle, N. J. near Fort Monmouth, N. J.

A more detailed statement of route or routes (or territory) is contained in said application, copies of which are on file and may be inspected at the office of the Interstate Commerce Commission, Washington, D. C., or offices of the boards, commissions, or officials of the States involved in this application.

Present: William E. Lee, Commissioner, to whom the matters which are the subject of this order have been assigned for action thereon.

It appearing, That the above-entitled matter is one which the Commission is authorized by the Interstate Commerce Act, to refer to an examiner:

It is ordered, That the above-entitled matter be, and it is hereby, referred to Examiner Harold P. Boss, for hearing on the 5th day of November, A. D., 1947, at 9:30 a.m., United States standard time, at the Interstate Commerce Commission, Washington, D. C., and for the recommendation of an appropriate order thereon accompanied by the reasons, therefor;

It is further ordered, That applicant shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in the application;

It is further ordered, That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted;

It is further ordered, That notice of this proceeding be duly given;

And it is further ordered, That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Interstate Commerce Commission, Washington, D. C., to that effect by notice which must reach the commission within ten days from the date of service hereof, and that the day of mailing of this order shall be considered as the time when the order is served.

Dated at Washington, D. C., this 13th day of October, A. D., 1947.

By the Commission, Commissioner Lee.

W. P. Bartel, ss, Secretary. (Seal.)

[fol. 12] EXHIBIT "C" TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 15th day of March, A. D., 1948.

No. MC 200 Sub No. 84

Riss & Company, Inc., Extension—Explosives

Kansas City, Missouri

Upon consideration of the record in the above-entitled proceeding, and of petition of applicant, filed January 28, 1948, for further hearing, and of reply of Isaac K. Hay, attorney for the Interstate Commerce Commission; and good cause appearing therefor:

It is ordered, That said proceeding be, and it is hereby, reopened for further hearing solely for the purpose of introducing evidence respecting exhibit 239;

It is further ordered, That the above-entitled matter be, and it is hereby, referred to Examiner Harold P. Boss for further hearing on the 14th day of April, A. D., 1948, at 9:30 o'clock a.m., United States standard time, at the Interstate Commerce Commission, Washington, District of Columbia, and for the recommendation of an appropriate order thereon, accompanied by the reasons therefor.

By the Commission, Division 5.

W. P. Bartel, ss, Secretary. (Seal.)

[fol. 13] EXHIBIT "D" TO COMPLAINT

Interstate Commerce Commission

Washington, D. C.

April 13, 1948

No. MC-200 (Sub-No. 84)

Riss & Company, Inc.

Kansas City, Mo.

Hearing in the above-entitled application, now assigned April 14, 1948, at Washington, D. C., before Examiner Harold P. Boss is postponed to the 19th day of May, A. D. 1948, at 9:30 a.m. United States Standard Time, at the Interstate Commerce Commission, Washington, D. C., before Examiner Harold P. Boss.

By the Commission.

W. P. Bartel, Secretary.

[fol. 14] EXHIBIT "E" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 28th day of July, A. D., 1948.

No. MC 200 Sub No. 84

Riss & Company, Inc., Extension—Explosives

Upon consideration of applicant's petition dated June 28, 1948, in the above-entitled proceeding that the proceeding be reassigned for hearing anew under and in accordance with the provisions of sections 5, 7 and 8 of the Administrative Procedure Act, and that the date for filing briefs be postponed to a reasonable time following final determination of the issue as to the application of sections 5, 7 and 8 of the Administrative Procedure Act:

It is ordered, That the said petition be, and it is hereby, denied, for the reasons that the said proceeding is not required by statute to be determined on the record after op-

portunity for an agency hearing and, therefore, is not a case of adjudication which is required by section 5 of the Administrative Procedure Act to be heard and decided in conformity with sections 7 and 8 of that act, and the provisions of sections 5, 7 and 8 of that act do not apply to the said proceeding.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 15] EXHIBIT "F" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of September, A. D., 1948.

No. MC-200 (Sub-No. 84)

Riss & Company, Inc., Extension—Explosives

Kansas City, Missouri

Upon consideration of the record in the above-entitled proceeding, and petition of applicant, dated August 25, 1948, for reconsideration of the order of July 28, 1948, denying its petition for a new hearing by an examiner appointed under the Administrative Procedure Act; and good cause appearing therefor;

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 16] EXHIBIT "G" TO COMPLAINT

Interstate Commerce Commission

No. MC-200 (Sub-No. 84)

Riss & Company, Inc., Extension—Explosives

Submitted May 9, 1949. Decided August 10, 1949.

Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle

of general commodities, with exceptions, and of specified commodities, from or to points or areas in named States, over regular and irregular routes. Application denied.

Wendell Berge, William C. Dannevik, Jr., Monroe P. Hester, A. Alvis Layne, Jr., and *D. C. Stone* for applicant.

Isaac K. Hay for Bureau of Motor Carriers, Interstate Commerce Commission.

A. R. Eldred, Frank B. Hand, Jr., Harold G. Hernly, F. X. Masterson, and *James W. Nisbet* for protestants and interveners in opposition to the application.

Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

This proceeding has been twice heard. After the initial hearing and before the issuance of a report and recommended order by the examiner, the proceeding was reopened for further hearing solely for the purpose of introducing evidence respecting an exhibit which in view of our conclusions herein, need not be discussed. Exceptions [1] were filed by applicant to the order recommended by the examiner and Baggett Transportation Co., Inc., intervener, replied.

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[1] At the further hearing, applicant objected to the hearing on the ground that it was contrary to, and in violation of, certain provisions of the Administrative Procedure Act, hereinafter called the A. P. Act. Subsequently applicant filed a petition requesting a hearing in accordance with the provisions of that act. This petition was denied by order entered July 28, 1948. Applicant thereafter filed a complaint in the United States District Court for the District of Columbia seeking a mandatory injunction directing the Commission to afford it a hearing under the A. P. Act. Applicant's motion for summary judgment was denied and the case is now pending on appeal in the United States Court of Appeals. In its exceptions in the instant proceeding, applicant states that nothing in the exceptions or the filing thereof is to be taken as waiving any rights it may have under the A. P. Act.

[fol. 17] By application filed August 22, 1947, as amended, Riss & Company, Inc., of North Kansas City, Mo., seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle of the commodities, from and to the points, and in the manner specified in the appendix attached. Baggett Transportation Company, D. G. Dailey, doing business as Denver Amarillo Express, and Class I rail carriers in western trunk-line and official classification territories, except The New York, Chicago and St. Louis Railroad Company, oppose the application. The Bureau of Motor Carriers, Interstate Commerce Commission, hereinafter called the Bureau, was represented by counsel who participated in developing facts concerning applicant's failure to observe the Commission's rules and regulations.

Applicant began motor-carrier operations prior to 1935. It now holds several certificates authorizing it to operate as a common carrier by motor vehicle, and it also conducts operations under claimed "grandfather" rights. Its operating rights are described in some detail in *Performance of Motor Com. Car. Service by Riss & Co., Inc.*, 48 M.C.C. 327. Briefly, the certificates now held by applicant, and its confirmed operating rights (see *Riss & Co., Inc., Common Carrier Application*, 44 M.C.C. 802 and 48 M.C.C. 573), collectively cover the transportation (1) of general and specified commodities over regular and irregular routes, between points in an extensive territory extending from the Atlantic Seaboard on the east, to Colorado and Texas points, on the west and southwest, embracing 22 States and the District of Columbia, and (2) of dangerous explosives to and from a number of points, principally west of Chicago, Ill., and St. Louis, Mo. Applicant also holds temporary authorities, [fol. 18] now conditioned to expire with the final determination of the instant application, generally to transport the commodities, from and to the points, and in the manner set forth in the attached appendix. By the instant application, it seeks to make permanent its temporary authorities.

No shipper witnesses support the application. Applicant relies on its evidence of past alleged carrier operations conducted under appropriate temporary authorities to establish a need for the proposed service. In fact, the evidence adduced in this proceeding goes principally to the issue of whether applicant is fit to conduct the proposed operation and willing to conform to the requirements of

the Interstate Commerce Act, and to the Commission's rules and regulations thereunder. The Bureau's evidence goes only to this issue, and concerns applicant's compliance or non-compliance with the Commission's motor-carrier safety regulations.

The two principal issues here involved are: (1) Whether applicant is fit, willing, and able properly to perform the service proposed, and (2) whether public convenience and necessity require the proposed operation, or any part thereof. The examiner found that applicant had failed to establish (a) that it is able properly to perform the proposed service as a common carrier by motor vehicle as defined in section 203(a)(14) of the act, and (b) that the present or future public convenience and necessity require the proposed operation. He recommended that the application be denied. As stated, exceptions were filed by applicant. We shall first discuss the evidence presented relative to the public convenience and necessity issue, as a negative finding with respect thereto will render it unnecessary to consider the issue of applicant's fitness or ability to perform the proposed service, or certain other issues raised on exceptions.

[fol. 19] As shown in the attached appendix, applicant seeks authority to transport (1) general commodities, with exceptions which do not include dangerous explosives; to and from six designated points located within short distances from applicant's presently authorized operations, and (2) dangerous explosives; (a) between all points which applicant is presently authorized to serve over regular or irregular routes in 22 States and the District of Columbia, and (b) between Crane, Ind., on the one hand, and, on the other, four points in Virginia and New Jersey. To establish a need for the authority sought, applicant relied entirely on evidence of its past alleged carrier operations conducted under appropriate temporary authorities. No shippers support the application.

Section 210a(a) of the Interstate Commerce Act specifically provides that a grant of temporary authority "shall create no presumption that corresponding permanent authority will be granted" and we have repeatedly stated that the mere fact that a carrier has been able to obtain traffic while operating under temporary authority creates no presumption that continuance of such operation is required by the present or future public convenience and necessity.

See, for example, *Major Contract Carrier Application*, 43 M.C.C. 795, 799. Further, we are of the opinion that permanent authority to transport dangerous explosives particularly should not be issued unless a definite and continuing need for such service has been established. See *Baggett Transportation Company Extension—Explosives —Grafton*, M.C.C. (No. MC-89778 (Sub-No. 20), decided March 22, 1949). In this connection, it is significant that dangerous explosives are not now manufactured at the Sunflower Ordnance Plant (Sunflower, Kansas), that applicant has not transported any explosives from that plant [fol. 20] since November 1947, and that the service rendered to and from certain other points listed in applicant's exhibits was rendered only for short periods of time. There is nothing of record to establish that the points served under temporary authority will in the future have a need for the proposed service. We are empowered under section 210a(a) of the act to issue temporary authority to cover operations in temporary emergencies. We conclude that applicant has failed to establish a need for its service in the transportation of dangerous explosives. See *The Motor Haulage Company, Inc., Extension—Explosives*, — M.C.C. —, (No. MC-31214 (Sub-No. 2), decided September 13, 1948) and *Buckingham Transportation Company Extension—Dangerous Explosives*, — M.C.C. —, (No. MC-103435 (Sub-No. 24), decided March 14 1949).

As seen, applicant also requests authority to transport general commodities to and from six designated points. It has transported various commodities to and from these points under its temporary authorities. Evidence of past operations though relevant, cannot however, be considered as controlling. Rather, it must be weighed with the evidence of supporting shippers. *D. A. Beard Truck Lines Co. Com. Car. Applic.—New Operation*, 34 M.C.C. 395, 397. Here no shippers support the application. In the circumstances, we also conclude that applicant has failed to establish a need for its service in the proposed transportation of general commodities.

In view of our conclusions that applicant has failed to establish a need for the proposed service, it is not necessary to set forth the service, if any, rendered by those carriers who oppose the application.

As stated, it is unnecessary to consider the issue of applicant's fitness or ability to perform the proposed service in view of the above conclusions that applicant has failed to establish that public convenience and necessity require the proposed service. It may be observed, however, that the evidence concerning the issue of applicant's fitness covers the period from January 1945 to November 1947, and that during such period applicant was operating under the so-called "provider" plan. This method of operation is summarized at page 348 of *Performance of Motor Com. Car. Service by Riss & Co., Inc., supra,* and need not be discussed herein. In that proceeding, we found that, under the provider plan, Riss & Company, Inc., (applicant herein) had not been, and was not then, operating as a common carrier by motor vehicle as defined in section 203(a) (14) of [fol. 21] the act. Riss was ordered to institute and to render reasonably continuous and adequate service to the public as a common carrier by motor vehicle pursuant to the certificates issued to it and under its authority to operate in No. MC-200 (Sub-No. 46), and to comply with the provisions of the act and with the Commission's rules and regulations promulgated thereunder. Following our finding therein, Riss changed its method of operation and in No. MC-C-484, Riss & Company, Inc., Revocation of Certificates, — M.C.C. —, (decided July 15, 1949) on further hearing, we found, insofar as here pertinent, that Riss is now operating as a common carrier by motor vehicle as defined in section 203(a) (14) of the act. Its present method of operation is not of record in this proceeding. In view of the foregoing, it is doubtful whether any finding can now be made on this record concerning applicant's fitness or ability properly to perform the proposed service. In any event, the latter issue is immaterial herein in view of our conclusion that the application should be denied on other grounds.

We find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operations, and that the application should be denied.

An appropriate order will be entered.

[fol. 22] Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C. on the 10th day of August, A. D., 1949.

No. MC-200 (Sub-No. 84)

Riss & Company, Inc., Extension—Explosives

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby, denied.

By the Commission, division 5. W. P. Bartel, Secretary. (Seal.)

[fol. 23] Exhibit "H" to Complaint

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 19th day of April, A. D., 1950

No. MC-200 (Sub-No. 84)

Riss & Company, Inc., Extension—Explosive

North Kansas City, Missouri

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed December 5, 1949, for rehearing;

(2) Petition of applicant, filed February 27, 1950, for hearing de novo in accordance with the provisions of sections 5, 7, and 8 of the Administrative Procedure Act;

(3) Reply of Eastern Railroads, protestants, to petition filed December 5, 1959;

(4) Joint reply of interveners, Denver-Amarillo Express, Inc., and Baggett Transportation Co., Inc., to petition filed December 5, 1949;

and good cause appearing therefor:

It is ordered, That said petition filed December 5, 1949, be, and it is hereby, denied, except to the extent granted by order of Division 5 of January 25, 1950, for the reason that applicant does not offer to present any public witnesses to prove that the proposed services are required by public convenience and necessity, except between Crane, Ind., and Earle, N. J.;

It is further ordered, That said petition filed February 27, 1950, be, and it is hereby, denied, for the reason that sections 5, 7 and 8 of the Administrative Procedure Act do not apply to this proceeding;

It is further ordered, That the temporary authority held in force by reason of the pendency of the application in this proceeding be, and it is hereby, terminated forthwith, except between Crane, Ind., and Earle, N. J.

By the Commission. W. P. Bartel, Secretary. (Seal.)

[fols. 24-28] APPENDIX

Authority Sought

Regular Routes:

General commodities, except those of unusual value, and except commodities in bulk, those requiring special equipment, and excepting livestock.

Between Kansas City, Mo.-Kans., and Lawrence, Kans., as follows:

From Kansas City, Mo.-Kans., over Kansas Highway No. 10 to junction U. S. Highway No. 59, thence over U. S. Highway No. 59 to Lawrence, Kans., serving the Sunflower Ordnance Works as an intermediate point.

General commodities, except livestock,

To and from Tinker Field near Oklahoma City, Okla.; Camp Carson near Colorado Springs, Colo.; Topeka Air Base, approximately five miles south of Topeka, Kans.; and the Pueblo Ordnance Depot, approximately six miles from Pueblo, Colo., as off-route points in connection with applicant's presently authorized operations to and from Oklahoma City, Okla., Colorado Springs, Colo., Topeka, Kans., and Pueblo, Colo., respectively.

General commodities, except those of unusual value, and except commodities in bulk, those requiring special equipment, and except livestock and household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

To and from Cornhusker Ordnance Works near Grand Island, Nebr., as an off-route point in connection with applicant's presently authorized operations.

Dangerous explosives and ordnance supplies,

To, from, and/or between points which applicant is presently authorized to serve in connection with operations over regular routes and irregular routes in the States of Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Ohio (Oklahoma, Pennsylvania, Virginia, Rhode Island, Texas, and West Virginia.

Irregular Routes:

Explosives, ordnance stores, ammunition and dangerous articles,

Between Crane, Ind., on the one hand, and, on the other, the Naval Mine Depot, Yorktown, Va., the Navy Ammunition Depot; St. Julien's Creek, Portsmouth, Va., the Naval Air Station, Norfolk, Va., and Earle, N. J., near Fort Monmouth, N. J.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT INTERSTATE COMMERCE COMMISSION—Filed June 8, 1950

The Interstate Commerce Commission, a defendant herein, for answer to the complaint herein filed, says:

1-5

It admits the allegations contained in paragraphs 1 to 5, inclusive, of the complaint.

6

It admits the allegations contained in paragraph 6 of the complaint except insofar as the averments of the first sentence of that paragraph are meant to, or may be taken to, imply that the presiding officer at the hearing was or would be influenced, directed, or ordered by his superiors in any manner or by any means in respect to his conduct of the hearings or in any recommendation or decision made, or any action taken, by him in the said proceeding, which implication or charge is specifically denied.

7-10

It admits the allegations contained in paragraphs 7 to 10, inclusive, of the complaint.

[fol. 30] It denies the allegations contained in the first three sentences of paragraph 11 of the complaint and on the contrary avers that the proceedings before the Commission on plaintiff's application are valid and in accordance with the applicable law. It admits the allegation in the fourth sentence of said paragraph that plaintiff has exhausted its administrative remedies.

12

It denies the allegations contained in paragraph 12 of the complaint.

Further answering the complaint, the Commission avers that the proceedings of which plaintiff complains were conducted in compliance with the applicable law and that the plaintiff was afforded opportunity for a full and fair hear-

ing and was accorded such hearing, participated therein, and introduced evidence in support of its application at such hearing. Defendant specifically denies that the said proceeding before the Interstate Commerce Commission was or is subject to the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007); denies that the said proceeding was or is void for the reasons alleged in the complaint or for any other reason or reasons; and denies that any right of plaintiff has been violated. Further, it avers that the proceeding instituted by plaintiff before the Commission was a proceeding cognizable under Section 207(a) of the Interstate Commerce Act (49 U. S. C. 307(a)); that said section makes no requirement for a hearing that by reason thereof the requirements of Sections 5, 7, and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007), do not apply to proceedings under said Section 207(a) (49 U. S. C. 307(a)); that its order of April 19, 1950, denying plaintiff's petition for a hearing de novo pursuant to the provisions of the said Administrative Procedure Act was and is a valid order within the compe-
[fol. 31] tency of the Commission.

The Commission further avers that at the hearing held in the proceeding on plaintiff's application for certificates of public convenience and necessity referred to in the complaint (paragraph 2), a large amount of testimony and other evidence bearing upon the issues involved were submitted to the Commission for consideration; that in said proceeding questions relating to said issues were submitted to the Commission for determination, including questions raised by the plaintiff; whereupon the Commission determined said issues and entered and served upon the parties to said proceeding, its report and order complained of herein; that said report and order contain the Commission's findings of fact and conclusions thereon upon the evidence aforesaid.

The Commission further alleges that each and all said findings and conclusions in said report were and are supported by substantial evidence.

The Commission further alleges that in making said report and order of August 10, 1949, it considered and weighed carefully in the light of its own knowledge and experience all of the facts and conditions called to its attention by all the parties to the proceeding.

The Commission further alleges that said report and order of August 10, 1949, was not made or entered either arbitrarily or capriciously or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority duly conferred upon it, and the Commission denies each and every allegation to the contrary contained in the complaint herein.

Wherefore, having made full answer, the Commission [fol. 32] prays that the complaint be dismissed.

Interstate Commerce Commission, by H. L. Underwood, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Of Counsel.

June 5, 1950.

[fol. 33] Certificate of Service

I hereby certify that I served the foregoing answer upon the following named persons this 5th day of June, 1950, by depositing in the United States mail a true copy thereof, addressed to them at their respective addresses:

Wendell Berge, Esq., A. Alvis Layne, Jr., Esq., 1002 Ring Building, Washington, D. C.; John B. Gage, Esq., 1007 Bryant Building, Kansas City, Mo., Attorneys for Plaintiff.

John F. Baecher, Esq., Special Assistant to the Attorney General, 3501 Department of Justice Building, Washington 25, D. C., Attorney for United States, Defendant.

H. L. Underwood, Assistant Chief Counsel, Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 34] In United States District Court

[Title omitted]

Answer of Defendant United States of America—Filed June 30, 1950

Comes now defendant United States of America and answers the complaint on file herein as follows:

I

As to paragraphs 1-5, upon information and belief admits the allegations thereof.

II

As to paragraph 6, upon information and belief admits the allegations thereof except insofar as the averments of the first sentence of that paragraph may be taken to imply that the presiding officer at the hearings was or would be influenced, ordered, or directed by his superiors in any manner or by any means in respect to his conduct of the hearings or in any recommendation or decision made, or any action taken, by him in the said proceeding, which implication or charge is spec-fically denied.

III

As to paragraphs 7-10, upon information and belief admits the allegations thereof.

IV

As to paragraph 11, denies the allegations contained in the first, second and third sentences thereof and on the contrary avers that the proceedings before the Interstate Commerce Commission on plaintiff's application were and are valid and in accordance with applicable law. Upon information and belief it admits the allegation in the fourth sentence of said paragraph that plaintiff has exhausted its administrative remedies.

[fol. 35] V

As to paragraph 12, denies the allegations thereof.

VI

Further answering the complaint, the United States of America specifically denies that the said proceeding before the Interstate Commerce Commission was or is subject to the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007); denies that the said proceeding was or is void for the reasons alleged in the complaint or for any other reason or reasons; and denies that any right of plaintiff has been violated. It avers, further, that the proceeding before the Interstate Commerce Commission was cognizable under Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)); that said section makes no requirement for a hearing and that

by reason thereof the requirements of Sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007), do not apply to proceedings under said Section 207 (a) (49 U.S.C. 307(a)); that the Interstate Commerce Commission's order of April 19, 1950, denying plaintiff's petition for a hearing de novo pursuant to the provisions of the said Administrative Procedure Act was and is a valid order within the competency of the Interstate Commerce Commission.

The United States of America further avers upon information and belief that at the hearing held in the proceeding on plaintiff's application for certificates of public convenience and necessity referred to in the complaint (paragraph 2), a large amount of testimony and other evidence bearing upon the issues involved were submitted to the Interstate Commerce Commission for consideration; that in said proceeding questions relating to said issues were submitted to the Interstate Commerce Commission for determination, including questions raised by the plaintiff; whereupon the Interstate Commerce Commission determined said issues and entered and served upon the parties to said proceeding, its report and order complained of herein; that said report and order contain the Interstate Commerce Commission's findings of fact and conclusions thereon upon the evidence aforesaid.

The United States of America further alleges upon information and belief that each and all of said findings and conclusions in said report were and are supported by substantial evidence.

The United States of America further alleges upon information and belief that the Interstate Commerce Commission in making said report and order of August 10, 1949, considered and weighed carefully in the light of its own knowledge and experience all of the facts and conditions called to its attention by all the parties to the proceeding; [fol. 36] and that said report and order of August 10, 1949, was not made or entered either arbitrarily or capriciously or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Interstate Commerce Commission did not exceed the authority duly conferred upon it, and the United States of America denies each and every allegation to the contrary contained in the complaint herein.

Wherefore, having made full answer, the United States of America prays that the complaint herein be dismissed.

United States of America, by Rodolfo A. Correa, Special Assistant to the Attorney General; Karl M. Kunz, Trial Attorney.

Herbert A. Bergson, Assistant Attorney General; Sam M. Wear, United States Attorney; James E. Kilday; John F. Baecher, Special Assistants to the Attorney General.

June 29, 1950.

[File endorsement omitted.]

[fol. 37] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 6344

RISS & COMPANY, INC., a corporation, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

FINDINGS OF FACT—Filed October 17, 1950

Plaintiff, a common carrier of general commodities by motor vehicle, subject to the regulatory provisions of Part II of the Interstate Commerce Act, (Title 49 U. S. C. A. 301, etc.) filed an application with the Interstate Commerce Commission, on August 22, 1947, for a certificate of public convenience and necessity to extend its operations as a common carrier over certain regular and irregular routes, to the extent that it had performed such service under temporary operating authorities issued by the Commission pursuant to Section 210(a) of the above Act, (49 U. S. C. A. 310(a)). A detailed statement of the authority sought by plaintiff in said application is not necessary. Suffice it to say that after said application was duly docketed the Commission ordered a hearing thereon before one of its own Examiners. Hearings were so held on seven days, over a period of several months, ending on May 20, 1948. During the hearing held on the last-mentioned date plaintiff first learned that the officer presiding at said hearings was not

an Examiner appointed and qualified under Section 11 of the Administrative Procedure Act (5 U. S. C. A. 1010). Thereupon, plaintiff made prompt objection to said hearings as being contrary to and in violation of the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 U. S. C. A. 1004-6-7) and all further proceedings, leading up to the order of the Commission here complained of, were held over plaintiff's continued objection. The officer pre- [fol. 38] siding at said hearings was at all times material hereto an employee of the Section of Complaints, Bureau of Motor Carriers, of the I. C. C. Said Bureau appeared in the above proceedings, opposing the granting of plaintiff's application, questioning only plaintiff's fitness and ability to perform the proposed service.

On June 28, 1948, plaintiff filed a petition before the I. C. C., requesting a hearing on its application in accordance with Sections 5, 7 and 8 of the A. P. A., supra. By order, dated July 28, 1948, the Commission denied said petition for the reason that the "proceeding was not required by statute to be determined on the record after opportunity for agency hearing" and the Commission concluded that it was "not a case of adjudication which is required by Section 5 of the Administrative Procedure Act to be heard and decided in conformity with Sections 7 and 8 of that Act, and (that) the provisions of Sections 5, 7 and 8 of that Act do not apply to said proceedings." Thereafter, on March 3, 1949, the officer presiding at said hearings recommended denial of plaintiff's aforesaid application on several grounds. August 10, 1949, Division 5 of the Commission entered an order denying plaintiff's application on the sole ground "that applicant has failed to establish that the present or future public convenience and necessity require the proposed operations." Plaintiff filed a petition for rehearing and reconsideration, and a further petition for a hearing in accordance with the aforementioned provisions of the A. P. A. At a General Session of the I. C. C., both said petitions were denied by order entered on April 19, 1950. In said order the denial of a certificate of authority to plaintiff was premised on the same grounds as contained in the Division 5 order, supra.

Reasoning

By its complaint herein, plaintiff seeks the injunctive processes of this Court restraining enforcement of the last-

mentioned order of the I. C. C., on the ground that determinations by the Commission of applications for certificates of public convenience and necessity to operate as a common carrier by motor vehicle under Part II of the I. C. C. [fol. 39] Act are adjudications required by statute to be made upon the record after opportunity for hearing before the I. C. C. under Sections 5, 7 and 8 of the A. P. A., and that having been denied such a hearing on its application plaintiff asserts the order so made by the I. C. C. is void and without authority of law. The contention is also made that said order is arbitrary, capricious, unsupported by, and contrary to, the evidence. At the submission of the instant action to the Court on its merits, plaintiff premised its right to relief solely on the first of the above-stated propositions. Neither by oral argument nor in its briefs does plaintiff undertake, in anywise, to sustain its contention that the order of the I. C. C. here complained of is arbitrary, capricious and unsupported by substantial evidence. So premising its attack, we conclude plaintiff has abandoned the last-mentioned issue. If not, then such issue should be, and is, found against plaintiff's contention for failure of plaintiff to point out and sustain the burden cast upon it to establish illegality of the order in the above respect; the presumption being in favor of the legality of the Commission's order as being premised on substantial evidence. *B. & O. R. Co.* v. *U. S.* 298 U. S. 349; *Carolina Scenic Coach Lines* v. *U. S.*, 59 F. Supp. 336; *Gardner* v. *U. S.*, 67 F. Supp. 230; *Watson Bros. Transp. Co.* v. *U. S.* 59 F. Supp. 762; *Lang Transp. Co.* v. *U. S.*, 75 F. Supp. 915. Consequently, we shall confine our consideration to the single issue on which this action has been submitted and briefed by the parties.

Sections 5, 7 and 8 of the A. P. A. formally require that: "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," the officers presiding at such a hearing, if not the agency, or one or more members of the body which comprises the agency, shall be an Examiner appointed in accordance with the provisions of Section 11 of said Act. In light of the mandate thereof, the objection here made to the order under review is to be determined by a consideration of whether Section 207(a), Part II of the Interstate Commerce Act (49 U. S. C. A. 307(a)), specifically, or by implication of due process of law, requires adjudication of

all applications for certificates of public convenience and [fol. 40] necessity made by motor carriers "to be determined on the record after opportunity for an agency hearing."

Section 207(a), supra, authorizes the I. C. C. to issue a certificate of public convenience and necessity "to any qualified" motor carrier "if it is found that the applicant is fit, willing, and able to properly perform the service proposed * * * and, that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." From a perusal of the last-mentioned statute it is readily manifest that no provision is therein contained requiring a hearing to be held by the I. C. C. on an application for a certificate of authority filed by a motor carrier. Therefore, the matter here depends upon whether due process of law, in the statutory scheme provided by Congress for the issuance of certificates of authority to motor carriers under Part II of the I. C. C. Act compels that an agency hearing be held thereon and that all adjudications thereof are "required by statute to be determined on the record," so as to bring such matters within the ambit of the above sections of the A. P. A. Plaintiff, chiefly relying upon *Wong Yong Sung* v. *McGrath* 339 U. S. 33, contends that an affirmative answer must be made to that proposition. We do not agree.

In the Sung case, supra, the Supreme Court held that in the very nature of deportation proceedings when administrative officers acting as adversaries to a deportee are executing the provisions of the Immigration Act (8 U. S. C. A. 100, etc.) involving the liberty of persons, if not the very life of a deportee, the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution, compel that a hearing be held concerning the right to deportation, and in light of Section 7 of the A. P. A. the hearing compulsory in such proceedings must be one held before an Examiner appointed pursuant to Section 11 of the A. P. A. The compulsory hearing found essential to satisfy the essence of "due process of law" involved in deportation proceedings is not to be found [fol. 41] or read into all proceedings instituted by a motor carrier before the I. C. C. by the voluntary filing of an application for a certificate of authority under Section 207(a) of Part II of the I. C. C. Act, supra.

Under the statutory scheme devised by the Congress for the issuance of certificates of authority to motor carriers, we believe that under Section 207(a), supra, a "discretion" is lodged in the I.C.C., as it is with the Communications Commission under *47 U. S. C. A. 312 (b)*, as to whether or not certificate of authority is to be issued in the public interest. In *Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 137, Mr. Justice Frankfurter,* speaking for the Court, said:

> "• • • In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Such being the case, are all orders and decisions made by the I.C.C. in the issuance, or denial, of a certificate of authority after hearing on a voluntary application made therefor, "adjudications required by statute to be determined on the record after opportunity for an agency hearing," as contemplated in Section 5 of the A.P.A.? We think not.

The scope of inquiry that the I.C.C. may make as to the right of a motor carrier to have issued to it a certificate of authority is not circumscribed or delineated in any of the provisions of Part II of the I.C.C. Act. However, there is implicit in the provisions thereof that a full and fair opportunity to present matter before the Commission as to the right to a certificate is a fundamental requirement in

[fol. 42] such proceedings; and where such is denied, or is inadequate or unfair, the Commission's order is to be held void. We recognize the constitutional requirements for formal hearings by the Commission as ruled in the cases relied on by plaintiff, of which *Int. Com. Com. v. Louis. & Nash. R.R. Co., 227 U. S. 88*, and *American Trucking Ass'n v. United States, 326 U. S. 77*, are examples. Regardless of the rulings so made therein, we do not consider them authorities, ruling that hearings are to be held, either by the Commission itself, or an Examiner appointed by the Commission, on all applications for certificates of authority, and that such are compulsory in the constitutional sense, so as to bring such a proceeding within the provisions of Sections 5, 7 and 8 of the A.P.A. In proceedings before the Commission for a certificate of authority an applicant must be afforded an opportunity to establish its qualification to provide service as a motor carrier, and the public necessity for such service. That is an implicit requirement of Section 207(a), as well as other provisions of the I.C.C. Act. But to so hold is not to say that the determination in such a proceeding is a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." (*5 U. S. C. A. 1004*). Cf. *Bersoff v. Donaldson, 174 F. (2d) 494*. The record made at such a proceeding is a transcript, composed voluntarily by the applicant and submitted to the Commission for its expertise consideration which in its sound discretion we believe it may, or may not, grant, in the public interest as a matter of law. In consideration thereof the Commission is not usually required to weigh contested issues of fact such as are inherent in cases of adjudication contemplated by Section 5 of the A.P.A. The I.C.C. is only required to determine, within the expert judgment with which it is invested, whether the applicant has met the statutory policy requirements that authorize the issuance of such a certificate under the mandate of Section 207(a), supra. Such decision is essentially one of law, resting in part on statutory policy interests established by the Congress, having only prospective effects. The required determination by the Commission of the issue of public convenience and necessity, on the face of the statute, and under the legislative scheme established by the Congress, is not one made on existing facts, the result [fol. 43] of present controverted rights and duties usually

found in proceedings of an adjudicative character, as commonly understood, but is one made dependent upon policy interests as well as upon the showing made by a motor carrier, requiring the formation and determination of future rights and duties compatible with such policy. The material and ground for such a determination rests in part upon the transcript an applicant makes in such a proceeding, that is true, but a decision thereon having the above effect is the determination of a law proposition, and not one wholly resting in fact. Cf. *Communications Comm. v. W.J.R., 337 U. S. 265,* and *Bowles v. Willingham, 321 U. S. 503.*

In the proceedings before the Commission, review of which is here sought, the decision of the Commission denying a certificate of authority to plaintiff under Section 207(a), supra, was wholly premised on the failure of plaintiff-applicant to meet the requirement of showing public convenience and necessity, as required by Section 207(a), supra. The only testimony presented on that subject was adduced by the plaintiff. A detailed statement thereof is not necessary. It is sufficient to state that at the time plaintiff filed its instant application for permanent authoriy it had been operating under temporary authority granted to it under Section 210(a), supra. The application for permanent authority covers practically identical service as authorized by the temporary grant. Both have reference to transportation of general commodities and dangerous explosives. Plaintiff's own testimony established that as to explosives it had not, even under its temporary authority, transported any explosives from one authorized point on its temporary route since November, 1947, and that such service rendered by it, to and from certain other points, was only sporadic. Testimony of similar import was given by plaintiff's officers, concerning general commodities. The Commission determined from plaintiff's evidence alone that "applicant has failed to establish that the present or future public convenience and necessity required the proposed operations, and that the application should be denied" on that ground alone. "The effect of admitted facts is a question of law." *Nelson v. Montgomery Ward & Co., 312 U. S. 373, 376.* The decision so made by the Commission was "the equivalent of holding as a matter of law, in judicial par- [fol. 44] lance essentially as though raised upon demurrer" (*337 U. S. 270-1*) that issuance of a certificate of authority

on plaintiff's application therefor would be in appropriate and not in the public interest. As above pointed out, such decision and order of the I.C.C. rested in part upon legislative policy considerations. A proceeding subject to such a determination and conclusion is not, in our opinion, an adjudication made upon the record within the ambit of Sections 5, 7 and 8 of the A.P.A. Cf. *Schenley Distillers Corp. v. U. S., 50 F. Supp. 491.*

Plaintiff here admits "that the hearing it received or was accorded by the Commission was 'fair' in the sense that it was before an examiner who appeared to be competent and was willing to admit testimony" by all parties to the proceedings before the Commission. Most of the testimony received by said Examiner was not material to the issue of convenience and necessity determined by the Commission as above stated. Having received a "fair" hearing before the Commission, the fact that it was not conducted by an Examiner appointed under Section 11 of the A.P.A. did not convert it into an unconstitutional one, or deny to plaintiff "due process of law" in the inquiry and consideration of its said application. The fact that the Commission in its discretion granted a hearing before an Examiner in the employ of the Bureau of Motor Section, instead of holding the hearing itself, does not alter the situation.

Conclusion of Law

We conclude that in "proceedings" on applications for certificates of authority, authorized by Section 207(a), Part II of the I.C.C. Act, determinable as a matter of law, as in the instant proceeding, formal hearings are not required as in "a case of adjudication required by statute to be determined on the record" contemplated in Sections 5, 7 and 8 of the A.P.A. So concluding, the temporary injunction heretofore issued herein appears to have been improvidently granted; it is now set aside, and vacated, and plaintiff's [fol. 45] petition is ordered dismissed.

All concur.

Joseph W. Woodrough, Judge, United States Court of Appeals; R. M. Duncan, Judge, United States District Court; Albert A. Ridge, Judge, United States District Court.

Dated this 17th day of October, 1950.

[File endorsement omitted.]

[fol. 46] In the United States District Court for the Western District of Missouri, Western Division

No. 6344

Riss & Company, Inc., a corporation, Plaintiff,

v.

United States of America and Interstate Commerce Commission, Defendants

Decree—Filed November 17, 1950

This cause came on to be further heard on the 30th day of September, 1950, and was submitted on final hearing, by the parties by their respective counsel, on the pleadings, evidence, briefs and arguments of counsel, and was taken under advisement by the Court; and upon due consideration, it is now, this 17th day of November, 1950:

Ordered, Adjudged and Decreed, that (1) the temporary injunction, dated June 9, 1950, issued against the defendants herein, be, and the same is, now set aside and vacated; (2) the complaint herein be, and it is hereby, dismissed.

Joseph W. Woodrough, Judge, United States Court of Appeals; R. M. Duncan, Judge, United States District Court; Albert A. Ridge, Judge, United States District Court.

[File endorsement omitted.]

[fol. 47] In the United States District Court

[Title omitted]

Petition for Appeal—Filed November 20, 1950

Riss & Co., Inc., plaintiff in the above entitled cause considering itself aggrieved by the final decree and judgment of this court entered on the 17th day of November, 1950, does hereby pray that an appeal be allowed from said final decree and judgment and from each and every part thereof to the Supreme Court of the United States. The particulars wherein the plaintiff considers the order erroneous

are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Said plaintiff further prays that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiff, and that the amount of security be fixed by the order allowing the appeal, and that the material parts of the record, proceedings and papers upon which said final decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

John B. Gage, Wendell Berge, A. Alvis Layne, Jr.,
Counsel for Plaintiff-Appellant.

Dated: November 20, 1950.

[File endorsement omitted.]

[fol. 48] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 20, 1950

Now comes, Riss & Company, Inc., plaintiff in the above entitled cause, and in connection with its appeal herein, files the following assignment of errors upon which it will rely in the prosecution of said appeal to the Supreme Court of the United States from the final decree of the District Court dated —— —, ——.

The District Court erred

1. In holding and concluding that the determination of the Interstate Commerce Commission upon plaintiff's applications for a certificate of public convenience and necessity under Section 207(a) of the Interstate Commerce Act, 49 U. S. C. 307(a) is not an "adjudication" within the meaning of the Administrative Procedure Act, 5 U. S. C. 1001 *et seq.*

2. In holding and concluding that the determination of the Interstate Commerce Commission upon plaintiff's application for a certificate of public convenience and necessity is based only in part upon the record of the hearing

and is — no effect a decision of a proposition of law; that the determination of the Interstate Commerce Commission is not required by statute to be made upon the record within the meaning of Section 5 of the Administrative Procedure Act, 5 U. S. C. §1004.

3. In failing to hold and conclude that the proceedings of the Interstate Commerce Commission, upon the application of plaintiff for a certificate of public convenience and necessity was an adjudication required by statute to be made upon the record after opportunity for an agency hearing within the meaning of Section 5 of the Administrative Procedure Act 5 USC §1004.

4. In holding and concluding that the Interstate Commerce Commission was not required to afford plaintiff an opportunity for hearing and decision on its application for [fols. 49-50] a certificate of public convenience and necessity in accordance with Sections 5, 7 and 8 of the Administrative Procedure Act and that a hearing before an employee of the Section of Complaints, Bureau of Motor Carriers, Interstate Commerce Commission did not violate the provisions of the Administrative Procedure Act.

5. In failing to hold and conclude that plaintiff was entitled to hearing and decision before the Interstate Commerce Commission on its application for a certificate of public convenience and necessity in accordance with Sections 5, 7 and 8 of the Administrative Procedure Act and before an examiner appointed by the Civil Service Commission in accordance with Section 11 of the Administrative Procedure Act.

6. In holding that plaintiff had abandoned its allegation that the orders of the Interstate Commerce Commission dated August 10, 1949, and April 19, 1950, were and are arbitrary and capricious and without support of substantial evidence in the record.

7. In holding that the orders and the findings of the Interstate Commerce Commission contained therein dated August 10, 1949, and April 19, 1950, denying plaintiff's application for a certificate of public convenience and necessity were supported by substantial evidence in the record.

8. In failing to hold and conclude that the orders of the Commission dated August 10, 1949, and April 19, 1950, were arbitrary and capricious and unsupported by substantial evidence.

9. In failing to hold and conclude that the Interstate Commerce Commission during the course of the administrative hearing prejudicially altered its rules without notice to plaintiff.

10. In holding that the orders of the Commission dated July 28, 1948, September 7, 1948, August 10, 1949 and April 19, 1950, were in all respects valid and lawful and in dismissing plaintiff's complaint.

11. In failing to annul, set aside and permanently enjoin the orders of the Commission entered respectively on July 28, 1948, September 7, 1948, August 10, 1949, and April 19, 1950.

Wherefore, plaintiff, Riss & Company, Inc., prays that the final decree of the District Court be reversed, and for such other relief as to the Court may deem fit and proper.

John B. Gage, Counsel for Plaintiff-Appellant.

[File endorsement omitted.]

[fols. 51-55] In the United States District Court

Order Allowing Appeal—Filed November 20, 1950

Riss & Company, Inc., plaintiff, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final decree and judgment of this court in this cause entered on the 17th day of November, 1950, and from each and every part thereof, and having made and filed an assignment of errors and prayer for reversal and statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided,

Now, therefore, it is hereby ordered and decreed that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be the same as hereby fixed in the sum of $1,000.00, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that Citation be issued in accordance with law.

Albert A. Ridge, United States District Judge.

Dated: November 20, 1950.

[File endorsement omitted.]

[fol. 56] IN THE SUPREME COURT OF THE UNITED STATES

No. 479

October Term, 1950

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed January 17, 1951

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The district court erred in holding that the proceedings of the Interstate Commerce Commission upon applications for certificates of public convenience and necessity to operate as common carriers by motor vehicle under Section 207(a) of the Interstate Commerce Act are not adjudications required by statute to be determined upon the record after opportunity for an agency hearing within the meaning of the Administrative Procedure Act and, therefore, that applicants for such certificates are not entitled to hearing and decision by the Interstate Commerce Commission in accordance with Sections 5, 7 and 8 of the Administrative Procedure Act (5. U.S.C. § 1006, 1007, 1008) and before an examiner appointed and qualified under Section 11 of that Act (5 U.S.C. § 1012).

2. The district court erred in holding that the orders of the Interstate Commerce Commission dated July 28, 1948, September 7, 1948, August 10, 1949, and April 19, 1950, were in all respects valid and lawful and in dismissing the complaint.

[fol. 57] Appellant designates, pursuant to Rule 13, paragraph 9, of this Court the following portions of the record for printing by the Clerk of this Court:

Item	Page of the Record
1. Complaint and attached exhibits A-H inclusive	2-24 inclusive
2. Answer of the Interstate Commerce Commission	29-33 inclusive
3. Answer of the United States	34-36 inclusive
4. Findings of Fact, Reasoning and Conclusion of Law of the district court	37-45 inclusive

Item	Page of the Record
5. Final Decree of the district court	46
6. Petition for Appeal	47
7. Assignment of Errors	48-49 inclusive
8. Order of the district court allowing appeal	51

John B. Gage, Wendell Berge, A. Alvis Layne, Jr., Counsel for Appellant.

[fol. 58] I hereby acknowledge the receipt this 17th day of January, 1951, of a copy of the foregoing statement of points to be relied upon and designation of parts of the record to be printed.

Philip B. Perlman, Solicitor General.

I hereby acknowledge the receipt this 17th day of January, 1951, of a copy of the foregoing statement of points to be relied upon and designation of parts of the record to be printed.

H. L. Underwood, Ass't Chief Counsel, Interstate Commerce Commission.

[fol. 58a] [File endorsement omitted.]

[fol. 59] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PARTS OF THE RECORD TO BE PRINTED —Filed January 31, 1951

Appellant's Exhibit No. 1, introduced in evidence at the hearing in this cause before the United States District Court on June 8, 1950, consists in part of certified copies of 958 pages of testimony and 264 exhibits before the Interstate Commerce Commission in *Riss & Company, Inc. Extension—Explosives*, No. MC-200 (Sub. No. 84) on the Commission's docket. Such testimony and exhibits have been included as part of the record on appeal herein, pursuant to item 6 of the praecipe of appellant for transcript of record, heretofore filed herein.

Inasmuch as the parties to this appeal do not consider it necessary to refer extensively to the testimony and exhibits before the Commission, they have entered into this stipulation for the purpose of minimizing the cost of printing the record herein.

It is, therefore, stipulated and agreed that that part of the record on appeal consisting of certified copies of the testimony and exhibits before the Interstate Commerce [fol. 60] Commission in *Riss & Company, Inc. Extension—Explosives*, No. MC-200 (Sub No. 84), which were introduced in evidence as part of appellant's Exhibit No. 1 at the hearing before the United States District Court on June 8, 1950, and were included in the record on appeal herein pursuant to item 6 of appellant's praecipe for transcript of record, shall stand as part of the record on appeal as original exhibits and shall not be printed, but any party and the Court may refer to such documents with the same force and effect as if they had been printed in full in the transcript of record. The parts of the record designated in appellant's Designation of Parts of Record to be Printed filed in this Court on January 17, 1951, shall be printed.

A. Alvis Layne, Jr., Attorney for Appellant; Philip B. Perlman, Solicitor General, for Appellee United States of America; Daniel W. Knowlton, Chief Counsel, for Appellee Interstate Commerce Commission.

[fol. 60a] [File endorsement omitted.]

[fol. 61] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 479

ORDER NOTING PROBABLE JURISDICTION—February 26, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 54,985 U. S. D. C., Western Missouri, Term No. 479, Riss and Company, Inc., a Corporation, Appellant, vs. The United States of America and Interstate Commerce Commission. Filed January 3, 1951. Term No. 479 O.T. 1950.

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IN THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

CIVIL ACTION NO. 6344

RISS & COMPANY, INC.,

Plaintiff,

v.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Riss & Company, Inc., submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Western District of Missouri has not yet been reported. A copy of the opinion of the District Court containing the findings of fact, conclusion of law and judgment and a copy of the final decree are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on November 17, 1950. A petition is presented to the District Court herewith, to wit, on November 20, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capital Transit Company*, 338 U. S. 680; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *American Trucking Associations* v. *United States*, 325 U. S. 88; *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 256.

Questions Presented

Whether applicants for certificates of public convenience and necessity to operate as a common carrier by motor vehicle under Section 207(a) of the Interstate Commerce Act are entitled to hearing and decision by the Interstate Commerce Commission in accordance with Sections 5, 7 and 8 of the Administrative Procedure Act and before an examiner appointed and qualified under Section 11 of that Act.[1]

Statutes Involved

Interpretation of several sections of the Administrative Procedure Act (5 U. S. C. §1001, *et seq.*) and of Part II of the Interstate Commerce Act (49 U. S. C. §301, *et seq.*) are involved, particularly Sections 2(d) and (e), 5, 7, 8, 10 and 11 of the Administrative Procedure Act and Sections 205(e) and (g), 207(a) and 210(a) of the Interstate Com-

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[1] All the points raised in the Assignment of Errors are also presented. The Question Presented stated above sets forth the major issue.

merce Act. These sections are set out in Appendix B hereto.

Statement

Appellant, hereinafter referred to as Riss, is a common carrier by motor vehicle holding certificates of public convenience and necessity issued by the Interstate Commerce Commission authorizing transportation of property in interstate commerce over routes and to points in twenty-two states and the District of Columbia. Riss filed on August 22, 1947, an application with the Interstate Commerce Commission under Section 207(a) of the Interstate Commerce Act to extend its operations in the transportation of general commodities to certain designated points, short distances beyond its presently authorized routes; to authorize the transportation of dangerous explosives to, from and between all points and places authorized to be served in the transportation of general commodities except explosives; and to authorize the transportation of explosives over irregular routes between additional points. Riss had been granted, sometime prior to the filing of this application, temporary operating authority under Section 210(a) of the Interstate Commerce Act to conduct the proposed operations pending determination of the application filed under Section 207(a).

The application was set for hearing by the Commission and hearings were held on November 5, 6 and 7, 1947, on December 6 and 7, 1947, and on May 19 and 20, 1948. At these hearings, the Bureau of Motor Carriers of the Interstate Commerce Commission appeared as an intervenor in opposition to the application of Riss. The Bureau of Motor Carriers actively participated in the proceeding in opposition to Riss both by argument and the introduction of evidence relating to the past operations of Riss contesting

the fitness and ability of Riss properly to perform the service covered by the application. In addition, two motor carriers and all Class I rail carriers in Western Trunk Line and Official Classification Territories, except the New York, Chicago and St. Louis Railroad Company, appeared in opposition to Riss' application.

On May 20, 1948, Riss learned for the first time that the examiner presiding at the hearings was not an examiner appointed and qualified under Section 11 of the Administrative Procedure Act and was not otherwise qualified to preside at hearings under Section 7 of that Act. Indeed, the examiner presiding at the hearings and who subsequently issued a recommended report and order denying the application, was an employee of the Section of Complaints, Bureau of Motor Carriers of the Interstate Commerce Commission and responsible to the Chief of the Section of Complaints and the Director of the Bureau of Motor Carriers, which Bureau was actively opposing the application.

Riss upon learning these facts made prompt objection to the hearing as being contrary to and in violation of Sections 5, 7 and 8 of the Administrative Procedure Act and all further proceedings leading up to and including the final order of the Interstate Commerce Commission denying the application were held over continued objection. On June 28, 1948, Riss petitioned the Interstate Commerce Commission for a hearing and decision on its application in accordance with Sections 5, 7 and 8 of the Administrative Procedure Act. This petition was denied by the Interstate Commerce Commission on the ground that the "proceeding was not required by statute to be determined on the record after opportunity for agency hearing," and that, therefore, Sections 5, 7 and 8 of the Administrative Procedure Act were not applicable. A petition for reconsideration of this order

was likewise denied.[2] Thereafter, on March 3, 1948, the examiner filed his report and order recommending denial of the application. Division 5 of the Commission on August 10, 1949, entered an order denying the application. The petitions of Riss to the entire Commission for rehearing and reconsideration of the order of Division 5 and for a hearing on the application in accordance with the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act and before an examiner appointed under Section 11 of that Act, were denied by the Commission on April 19, 1950.

Riss brought this action in the United States District Court for the Western District of Missouri, Western Division, under Title 28, United States Code, Sections 1336 and 2321 to review the denial order of the Commission. Upon motion of Riss and after oral argument by the parties, the District Court issued a temporary injunction restraining and enjoining enforcement of the denial order of the Commission until further order of the District Court. Upon final hearing the District Court sustained the order of the Commission denying the application and dismissed plaintiff's complaint. The Court held that proceedings on applications for certificates of public convenience and neces-

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[2] Riss at that point sought to obtain a judicial declaration of its right to a hearing and decision in accordance with the Administrative Procedure Act. On September 20, 1948, Riss filed in the United States District Court for the District of Columbia for declaratory judgment of its right to such a hearing and an injunction to require the Commission to afford Riss such a hearing. The District Court entered summary judgment for the Commission. The United States Court of Appeals for the District of Columbia Circuit remanded the case with instructions to dismiss the complaint on the ground that Riss had not exhausted its administrative remedies since a final order on the denial or grant of the application had not been made. The Court of Appeals, accordingly, did not rule on the applicability of the Administrative Procedure Act to the proceedings of the Commission. *Riss and Company, Inc.* v. *Interstate Commerce Commission,* 179 F. 2d 810 (1949).

sity under Section 207(a) of the Interstate Commerce Act are not "adjudications required by statute to be determined on the record after opportunity for agency hearing within the meaning of Sections 5, 7 and 8 of the Administrative Procedure Act" and that Riss was not entitled to the procedure for hearing and decision before the Commission provided in those sections.

The District Court held that there was implicit in the motor carrier provisions of the Interstate Commerce Act a requirement that a full and fair opportunity be afforded to present matters before the Commission and that the Supreme Court had recognized the requirements for formal hearings. It was the view of the District Court, however, that the proceedings of the Interstate Commerce Commission on an application for certificates of public convenience and necessity did not constitute a case of adjudication contemplated by Section 5 of the Administrative Procedure Act. The District Court ruled that the determination of the Commission on such an application under the legislative scheme established by Congress is not made solely on existing facts, rights and duties found in proceedings of an adjudicative character but is dependent upon policy interests as well as upon the showing made by the applicant at the hearing. The District Court also held that while the decision of the Commission rests in part upon the transcript of the hearing, the determination of the Commission is the decision on a proposition of law. The District Court held in this aspect that the determination of the Commission was not "required by statute to be made on the record" within the meaning of Section 5 of the Administrative Procedure Act.

The Questions Involved Are Substantial

This appeal presents for the first time the question of whether the Interstate Commerce Commission must com-

ply with the procedure provided in the Administrative Procedure Act in motor carrier proceedings. The issue of whether the Interstate Commerce Commission must afford motor carrier applicants for certificates the fair hearing and decision procedure specified in the Administrative Procedure Act is of obvious importance to the entire motor carrier industry. The construction of both the Administrative Procedure Act and the Interstate Commerce Act adopted by the District Court conflict with both the policy and language of those statutes. The present decision of the District Court, if permitted to stand, would drastically limit the right of motor carrier applicants to hearing before the Commission and to decisions based upon substantial evidence in the record of the hearing. The construction of the District Court that the Commission under the Interstate Commerce Act is vested with discretion to grant or withhold certificates, and that the decision of the Commission is in essence the determination of a proposition of law based only "in part" upon the "voluntary" transcript made by an applicant signals a radical departure from repeated decision of the Supreme Court and of the Commission as to the rights of parties before the Commission and the extent of judicial review of orders of the Commission.

Section 5 of the Administrative Procedure Act is the keystone to the application of the adjudicative provisions of the Administrative Procedure Act. Thus, Sections 7 and 11 of the Administrative Procedure Act relating to hearing officers and their powers and Section 8 regarding agency decisions are applicable only if the administrative proceeding is subject to Section 5 of the Act. Section 5, by its terms, is applicable to "adjudication required by statute to be determined on the record after an opportunity for agency hearing." The controversy in the present case arose because Section 207(a) of the Interstate Commerce

Act providing for the issuance of certificates of public convenience and necessity to common carriers by motor vehicle does not, in terms, require a hearing. It has been the position of the Interstate Commerce Commission that irrespective of necessary construction of the statute that a hearing is required on such applications, the absence of the word "hearing" rendered the Administrative Procedure Act inapplicable. Although it is not clear from the District Court's opinion,[3] it would appear that the District Court did not so construe Section 5 of the Administrative Procedure Act. In any event, the decision of the Supreme Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, rejected the contention that the term "required by statute" in Section 5 of the Administrative Procedure Act rendered Section 5 applicable only where the agency statute in terms required a hearing. The Court held in the *Sung* case that Section 5 exempted only those hearings of less than statutory authority—those held by regulation, rule, custom or special dispensation; not those held by compulsion. It was conceded by the District Court that a hearing is required by the Interstate Commerce Act in the case of applications under Section 207(a). The decision of the District Court, therefore, rests upon the ruling that the proceedings of the

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[3] At one point the district court cited *Bersoff* v. *Donaldson*, 174 F. 2d 494 as comparative authority for the proposition that the proceedings of the Interstate Commmerce Commission were not a case of "adjudication required by statute to be determined on the record after opportunity for agency hearing" within the meaning of Section 5 of the Administrative Procedure Act. The *Bersoff* case was decided by the Court of Appeals for the District of Columbia Circuit more than a year before the decision of the Supreme Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. The decision in the *Bersoff* case denied the application of the Administrative Procedure Act to proceedings of the Postmaster General for the issuance of fraud orders on the sole ground that the statutes under which the Postmaster General acted, did not, in terms, require a hearing. 174 F. 2d 494, 495. R.S. 3929, as amended, 39 U.S.C. § 259; R.S. 4041, as amended, 39 U.S.C. § 732.

Interstate Commerce Commission upon applications for certificates under Section 207(a) is not an "adjudication" within the meaning of the Administrative Procedure Act and that although a hearing is required the determination is not required to be made on the record of the hearing.

1. The decision of the District Court is manifestly erroneous. Sections 2(d) and (e) of the Administrative Procedure Act define as an "adjudication" within the meaning of the Act agency process for the formulation of an order respecting the grant, denial or modification of any license or certificate. It is clear, therefore, that under the definition of "adjudication" contained in the Administrative Procedure Act, the proceedings of the Interstate Commerce Commission in the formulation of the order denying the application of Riss constituted an adjudication within the meaning of Section 5 of the Administrative Procedure Act. Other provisions of the Administrative Procedure Act make clear that proceedings for the issuance of certificates or licenses are and were intended to be covered by the provisions of Sections 5 and 7 of the Administrative Procedure Act. Sections 5(c) and 7 refer specifically to initial licensing proceedings. Moreover, the legislative history of the definition of adjudication demonstrates that licensing was specifically defined as an adjudication in order to make definite and inclusive the provisions of the Administrative Procedure Act relating to adjudication.

2. The ruling of the District Court that the determination of the Interstate Commerce Commission upon an application under Section 207(a) of the Interstate Commerce Act is only "in part" upon the record of the hearing and is in effect the determination of a question of law is also clearly erroneous. The District Court apparently reached this conclusion because it construed Section 207(a) to confer discretionary power upon the Commission in the grant

or denial of certificates of public convenience and necessity. More particularly, the District Court held that the determination of an application for a certificate is dependent upon statutory interests as well as upon the showing in the record. The District Court ruled that in this view the decision of the Commission is not required to be made upon the record of the hearing since the determination does not rest wholly on fact.

It is well settled by the Supreme Court that, in proceedings for the determination of the issuance or denial of a certificate under Section 207(a) of the Interstate Commerce Act, the Commission cannot prejudicially consider facts or evidence which the parties were given no opportunity to meet. Moreover, the Commission must act appropriately upon the record presented and such matters as properly may receive its attention through official notice. *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515. Nor may the Commission through the implement of official notice deprive the parties of a fair hearing. *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, 286-290; *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, 93, 94. It is equally well established that the determination of the Interstate Commerce Commission on an application for a certificate must be based upon a consideration of all relevant information and only after the receipt of all available material evidence offered all parties to the proceedings. *American Trucking Associations* v. *United States,* 326 U. S. 77.

The District Court, however, ruled that the determination of the Commission was not required to be made upon the record because the decision involved policy considerations requiring the formulation and determination of future rights and duties compatible with such policy. In essence, the District Court has ruled that the determination is not

made upon the record of the hearing because the final determination involves the exercise of an expert judgment on the intricacies of transportation problems. Thus, the fact that an administrative agency is an expert body informed by experience and charged with carrying out policies prescribed by Congress, is said to exempt process of the agency from the adjudicative provisions of the Administrative Procedure Act. This view of the District Court of the functions and power of the Interstate Commerce Commission and of the Administrative Procedure Act nullifies the application of the Administrative Procedure Act to any administrative proceeding. Virtually none of the many administrative proceedings of the Federal government would be encompassed in the Administrative Procedure Act if the expertise of the agencies and the existence of statutory policies which the agencies bring to administrative adjudications prevent the determinations from being required to be made "on the record of the hearing." The expert judgment and informed opinion of the Interstate Commerce Commission must be based on the evidence of record. The evidence may be such that, in the exercise of the expert judgment of the Commission, a grant or denial of the application is required. This judgment of the Commission must be expressed in findings which must have a rational basis in the evidence presented at the hearing. In no other way can it be determined whether the statutory standards and policies have been applied by the Commission to the case before it. *United States* v. *Carolina Freight Carrier Corp.*, 315 U. S. 475, 488-490.

The decision of the District Court that the determination of the Commission is not required to be made upon the record wholly ignores the provision for and scope of judicial review of final orders of the Interstate Commerce Commission. Section 205(g) of the Interstate Commerce

Act provides for judicial review of final orders of the Commission. This review is by a statutory three judge court convened under 29 U. S. C. §§1336, 1398, 2284, 2321-2325. The review of orders granting or denying certificates under Section 207(a) by the Court is limited to ascertaining whether there is warrant in law and the evidence for the determination. The findings of fact of the Commission, if supported by substantial evidence, are conclusive. *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515; *American Trucking Associations* v. *United States,* 325 U. S. 88. Further, while the Commission is not compelled to annotate to each finding the evidence to support it, the Commission must make the findings that are basic and essential to the operation of the statute. *United States* v. *Carolina Freight Carriers,* 315 U. S. 475, 489. It is apparent that the provision for limited judicial review based upon whether the findings are supported by evidence necessarily requires a determination made upon the record of a hearing. Without a hearing and determination on the record by the Commission, the provision for judicial review would be meaningless. The Courts would be powerless to determine whether in any case the statutory standards had been applied or whether there was sufficient evidence to support the findings of the Commission. *Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 303. Only through a full and fair hearing and a determination upon the record could a party test the sufficiency of the facts to support a finding since otherwise even though it appeared that the order was without evidence the deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information. *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, 94. The statutory right of judicial review would become an empty form unless the Commission is re-

quired to afford applicants an opportunity for hearing and to reach its decision upon the evidence of record in such a hearing. It should be noted that the Attorney General's Manual on the Administrative Procedure Act recognizes that there need be no express requirement in the statute for decision "on the record" in order to bring the administrative adjudication within Sections 5, 7 and 8 of the Administrative Procedure Act. This Manual points out that where provision is made for judicial review and the courts have held that the validity of the order must be determined, as here, on the administrative record, the adjudication is within Sections 5, 7 and 8.[4]

3. The ruling of the District Court ignores the express intention of Congress that applicants for certificates under Section 207(a) of the Interstate Commerce Act be afforded an opportunity for hearing before the Commission, and decision on the record as to the right to a certificate of public convenience and necessity. The Motor Carrier Act as enacted in 1935 did not provide for the issuance of temporary operating authority by the Commission to motor carriers where the need for service was imperative and immediate. The only statutory authority in the original statute for the issuance of operating rights was contained in Section 207(a) providing for the issuance of certificates of public convenience and necessity. The Commission, however, recognized that applications under 207(a) could be determined only after hearing and through the regular procedure of report and order. Accordingly, in 1938 the Interstate Commerce Commission submitted to Congress recommended changes in the motor carrier provisions of the Interstate Commerce Act. Among the changes recommended was to extend power to the Commission in its discretion to

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[4] *Attorney General's Manual on the Administrative Procedure Act*, (1947), pp. 41-42.

grant without hearing or formal procedure temporary operating authority for limited periods of time. It is significant that the recommendation of the Commission that it be extended this power, was based on the ground that a hearing was required by the Interstate Commerce Act in the case of applications under Section 207(a) for certificates of public convenience and necessity. The recommendation of the Commission to Congress stated:

> As the act now stands, it is necessary before new operations of a motor carrier can be undertaken to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future of public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.
>
> Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues there presented. The act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants of authority.
>
> Cases arise, and have been brought to our attention, where urgent need for interstate motor service suddenly develops. The bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation are good examples, and there are others.[5]

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[5] Recommendations of the Interstate Commerce Commission to Congress for Legislative Changes under Section 204(a)(7), Motor Carrier Act of 1935 dated February 25, 1938. Hearings, Sub-Committee of the Committee on Interstate and Foreign Commerce of the Senate on S. 3606, 75th Congress, 3d Sess. 5 (1938).

Commissioner Eastman in testifying before the House and Senate Committees in support of these changes also emphasized that the discretionary power to grant without hearings temporary operating authority was necessary because under Section 207(a) the Commission was required to hold hearings. Hearings, Sub-Committee of the Committee on Interstate and Foreign Commerce of the House on H. R. 9739, 75th Cong., 3d Sess. 11(1938); Hearings, Sub-Committee of the Committee on Interstate and Foreign Commerce of the Senate on S. 3606, 75th Cong., 3d Sess. 19 (1938).

Congress, in accordance with this recommendation of the Commission, enacted in 1938 Section 210(a) of the Interstate Commerce Act which provides:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Congress thus confirmed the construction that Section 207(a) requires that applicants and all other affected parties are entitled to a hearing before the Commission on an application for a certificate of public convenience and necessity. Clearly, the Commission by its recommendations recognized the requirement of formal hearing and decision under Section 207(a). Indeed, the Commission has consistently held that a determination on the record of a hear-

ing is essential to the exercise of the Commission's jurisdiction and power in the issuance of certificates of public convenience and necessity. See: *Monograph of the Attorney General's Committee on Administrative Procedure, Part II, Interstate Commerce Commission*, pp. 71-78. *Leonard Bros. Transfer & Storage Co., Inc., Extension*, 48 N. C. C. 773. The decision of the District Court in the present case imposes on motor carriers a wholly new and erroneous interpretation of the functions and powers of the Commission in these cases.

4. The Supreme Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 noted that one of the purposes of the Administrative Procedure Act was to introduce greater conformity of procedure and standardization of administrative practice among diverse agencies. The Supreme Court noted that any exception found to the applicability of the Administrative Procedure Act would tend to defeat this purpose. The legislative history of the Administrative Procedure Act clearly indicates that the Act was designed to apply "across the board" and that where a particular operation or function was exempted, similar functions in all agencies were exempted.[6] The decision of the District Court in this case manifestly creates an exemption for the Interstate Commerce Commission and defeats any uniformity of procedure among the diverse agencies engaged in adjudicating applications for certificates or licenses to engage in activity in interstate commerce. Under the interpretation advanced by defendants-appellees the Administrative Procedure Act is applicable to the determinations of the Civil Aeronautics Board on applications for certificates of public convenience and necessity for the operation of aircraft,[7] of the Federal

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[6] H.R. Rep. No. 1980, 79th Cong. 2d Sess. 16 (1946); 92 Cong. Rec. 2150 (March 12, 1946).

[7] Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. § 481.

Communications Commission on applications for certificates of public convenience and necessity for operation of broadcasting facilities,[8] of the Federal Power Commission for the operation of gas pipe lines[9] or electric transmission to foreign countries.[10] These agencies in the denial of licenses or certificates in such cases comply with the Administrative Procedure Act since the statutes, in terms, require hearings. Defendants-appellees insist in the present case that notwithstanding the admitted requirement of a hearing in the identical functions of the Interstate Commerce Commission the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act are inapplicable because of the absence of the word "hearing" in Section 207(a) of the Interstate Commerce Act. This construction of defendants-appellees does not conform with either the language or the purpose of the Administrative Procedure Act. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

The decision of the District Court proposes an interpretation of the Administrative Procedure Act which would preclude the application of Sections 5, 7 and 8 to any agency empowered to grant licenses or certificates under a standard of public convenience and necessity. Thus, the construction of the District Court that a decision on an application for a certificate of public convenience and necessity is not an "adjudication" as contemplated by Section 5 of the Administrative Procedure Act notwithstanding the specific definition in 2(d) and (e) to the contrary, would preclude the application of the Administrative Procedure Act

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[8] Act of June 19, 1934, 48 Stat. 1085, 47 U.S.C. § 309.

[9] Act of June 21, 1938, 52 Stat. 824, as amended, 15 U.S.C. § 717t.

[10] Act of June 10, 1920, added August 26, 1935, 49 Stat. 847, 16 U.S.C. § 824a.

to all agencies. Moreover, under the construction adopted by the District Court of the phrase "on the record," the determinations of these various agencies in licensing or certificate proceedings could not be within Sections 5, 7 and 8 since the policy considerations involved and the future effect of the determination would make all such adjudications decided only "in part" upon the record. Moreover, each of the licence or certificate functions of administrative agencies would be said to be discretionary even though, as here, the agency were required to make findings of fact and judicial review is available to determine whether the findings are supported by the evidence.

It is submitted that the District Court failed to give effect to the provisions of the Administrative Procedure Act which clearly cover the proceedings of the Interstate Commerce Commission on applications for certificates of public convenience and necessity as adjudications within the meaning of Section 5 of that Act. It is also submitted that the decision of the District Court failed to recognize that the expertise of the Commission must be exercised upon the evidence adduced at the hearing and that the findings must be supported by substantial evidence in the record. The decision of the District Court clearly fails to give effect to the provisions of the Administrative Procedure Act and denies to motor carrier applicants the benefits of administrative practice and procedure defined by Congress as fair and equitable. The basic issue is whether administrative agencies will be permitted to ignore and fail to give effect to the provisions of the Administrative Procedure Act which was designed to establish uniform standards of fair hearing and administrative procedure. See: McCarran, *The Administrative Procedure Act*, 38 Geo. L. J. 579 (1950). We believe the questions presented by this ap-

peal are substantial and that they are of importance to all motor carriers subject to the Interstate Commerce Act.

Respectfully submitted,

JOHN B. GAGE,
WENDELL BERGE,
J. ALVIS LAYNE,
Counsel for Plaintiff-Appellant.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 6344

RISS & COMPANY, INC., a corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

FINDINGS OF FACT

Plaintiff, a common carrier of general commodities by motor vehicle, subject to the regulatory provisions of Part II of the Interstate Commerce Act (Title 49 U. S. C. A. 301, etc.) filed an application with the Interstate Commerce Commission, on August 22, 1947, for a certificate of public convenience and necessity to extend its operations as a common carrier over certain regular and irregular routes, to the extent that it had performed such service under temporary operating authorities issued by the Commission pursuant to Section 210(a) of the above Act (49 U. S. C. A. 310(a)). A detailed statement of the authority sought by plaintiff in said application is not necessary. Suffice it to say that after said application was duly docketed the Commission ordered a hearing thereon before one of its own Examiners. Hearings were so held on seven days, over a period of several months, ending on May 20, 1948. During the hearing held on the last-mentioned date plaintiff first learned that the officer presiding at said hearings was not an Examiner appointed and qualified under Section 11 of the Administrative Procedure Act (5 U. S. C. A. 1010). Thereupon, plaintiff made prompt objection to said hearings as being contrary to and in violation of the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 U. S. C. A. 1004-6-7) and all further proceedings, leading up to the order of the Commission here complained of,

were held over plaintiff's continued objection. The officer presiding at said hearings was at all times material hereto an employee of the Section of Complaints, Bureau of Motor Carriers, of the I. C. C. Said Bureau appeared in the above proceedings, opposing the granting of plaintiff's application, questioning only plaintiff's fitness and ability to perform the proposed service.

On June 28, 1948, plaintiff filed a petition before the I. C. C., requesting a hearing on its application in accordance with Sections 5, 7 and 8 of the A. P. A., *supra*. By order, dated July 28, 1948, the Commission denied said petition for the reason that the "proceeding was not required by statute to be determined on the record after opportunity for agency hearing" and the Commission concluded that it was "not a case of adjudication which is required by Section 5 of the Administrative Procedure Act to be heard and decided in conformity with Sections 7 and 8 of that Act, and (that) the provisions of Sections 5, 7 and 8 of that Act do not apply to said proceedings." Thereafter, on March 3, 1949, the officer presiding at said hearings recommended denial of plaintiff's aforesaid application on several grounds. August 10, 1949, Division 5 of the Commission entered an order denying plaintiff's application on the sole ground "that applicant has failed to establish that the present or future public convenience and necessity require the proposed operations." Plaintiff filed a petition for rehearing and reconsideration, and a further petition for a hearing in accordance with the aforementioned provisions of the A. P. A. At a General Session of the I. C. C., both said petitions were denied by order entered on April 19, 1950. In said order the denial of a certificate of authority to plaintiff was premised on the same grounds as contained in the Division 5 order, *supra*.

Reasoning

By its complaint herein, plaintiff seeks the injunctive processes of this Court restraining enforcement of the last-mentioned order of the I. C. C., on the ground that determinations by the Commission of applications for certificates of public convenience and necessity to operate as a

common carrier by motor vehicles under Part II of the I. C. C. Act are adjudications required by statute to be made upon the record after opportunity for hearing before the I. C. C. under Sections 5, 7 and 8 of the A. P. A., and that having been denied such a hearing on its application plaintiff asserts the order so made by the I. C. C. is void and without authority of law. The contention is also made that said order is arbitrary, capricious, unsupported by, and contrary to, the evidence. At the submission of the instant action to the Court on its merits, plaintiff premised its right to relief solely on the first of the above-stated propositions. Neither by oral argument nor in its briefs does plaintiff undertake, in anywise, to sustain its contention that the order of the I. C. C. here complained of is arbitrary, capricious and unsupported by substantial evidence. So premising its attack, we conclude plaintiff has abandoned the last-mentioned issue. If not, then such issue should be, and is, found against plaintiff's contention for failure of plaintiff to point out and sustain the burden case upon it to establish illegality of the order in the above respect, the presumption being in favor of the legality of the Commission's order as being premised on substantial evidence. *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349; *Carolina Scenic Coach Line* v. *U. S.*, 59 F. Supp. 336; *Gardner* v. *U. S.*, 67 F. Supp. 230; *Watson Bros. Transp. Co.* v. *U. S.*, 59 F. Supp. 762; *Lang Transp. Co.* v. *U. S.*, 75 F. Supp. 915. Consequently, we shall confine our consideration to the single issue on which this action has been submitted and briefed by the parties.

Sections 5, 7 and 8 of the A. P. A. formally require that: "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," the officers presiding at such a hearing, if not the agency, or one or more members of the body which comprises the agency, shall be an Examiner appointed in accordance with the provisions of Section 11 of said Act. In light of the mandate thereof, the objection here made to the order under review is to be determined by a consideration of whether Section 207(a), Part II of the Interstate Commerce Act (49 U. S. C. A. 307(a)) specifically, or by im-

plication of due process of law, requires adjudication of all applications for certificates of public convenience and necessity made by motor carriers "to be determined on the record after opportunity for an agency hearing."

Section 207(a), *supra*, authorizes the I. C. C. to issue a certificate of public convenience and necessity "to any qualified" motor carrier "if it is found that the applicant is fit, willing, and able to properly perform the service proposed * * * and, that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." From a perusal of the last-mentioned statute it is readily manifest that no provision is therein contained requiring a hearing to be held by the I. C. C. on an application for a certificate of authority filed by a motor carrier. Therefore, the matter here depends upon whether due process of law, in the statutory scheme provided by Congress for the issuance of certificates of authority to motor carriers under Part II of the I. C. C. Act compels that an agency hearing be held thereon and that all adjudications thereof are "required by statute to be determined on the record," so as to bring such matters within the ambit of the above sections of the A. P. A. Plaintiff, chiefly relying upon *Wong Yong Sung* v. *McGrath*, 339 U. S. 33, contends that an affirmative answer must be made to that proposition. We do not agree.

In the *Sung* case, *supra*, the Supreme Court held that in the very nature of deportation proceedings when administrative officers acting as adversaries to a deportee are executing the provisions of the Immigration Act (8 U. S. C. A. 100, etc.) involving the liberty of persons, if not the very life of a deportee, the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution, compel that a hearing be held concerning the right to deportation, and in light of Section 7 of the A. P. A. the hearing compulsory in such proceedings must be one held before an Examiner appointed pursuant to Section 11 of the A. P. A. The compulsory hearing found essential to satisfy the essence of

"due process of law" involved in deportation proceedings is not to be found or read into all proceedings instituted by a motor carrier before the I. C. C. by the voluntary filing of an application for a certificate of authority under Section 207(a) of Part II of the I. C. C. Act, *supra*.

Under the statutory scheme devised by the Congress for the issuance of certificates of authority to motor carriers, we believe that under Section 207(a), *supra*, a "discretion" is lodged in the I. C. C., as it is with the Communications Commission under 47 U. S. C. A. 312(b), as to whether or not a certificate of authority is to be issued in the public interest. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, Mr. Justice Frankfurter, speaking for the Court, said:

> "* * * In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Such being the case, are all orders and decisions made by the I. C. C. in the issuance, or denial, of a certificate of authority after hearing on a voluntary application made therefor, "adjudications required by statute to be deter-

mined on the record after opportunity for an agency hearing," as contemplated in Section 5 of the A. P. A.? We think not.

The scope of inquiry that the I. C. C. may make as to the right of a motor carrier to have issued to it a certificate of authority is not circumscribed or delineated in any of the provisions of Part II of the I. C. C. Act. However, there is implicit in the provisions thereof that a full and fair opportunity to present matter before the Commission as to the right to a certificate is a fundamental requirement in such proceedings; and where such is denied, or is inadequate or unfair, the Commission's order is to be held void. We recognize the constitutional requirements for formal hearings by the Commission as ruled in the cases relied on by plaintiff, of which *Int. Com. Com.* v. *Louis. & Nash. R. R. Co.*, 227 U. S. 88, and *American Trucking Ass'n* v. *United States*, 326 U. S. 77, are examples. Regardless of the rulings so made therein, we do not consider them authorities, ruling that hearings are to be held, either by the Commission itself, or an Examiner appointed by the Commission, on all applications for certificates of authority, and that such are compulsory in the constitutional sense, so as to bring such a proceeding within the provisions of Sections 5, 7 and 8 of the A. P. A. In proceedings before the Commission for a certificate of authority an applicant must be afforded an opportunity to establish its qualification to provide service as a motor carrier, and the public necessity for such service. That is an implicit requirement of Section 207(a), as well as other provisions of the I. C. C. Act. But to so hold is not to say that the determination in such a proceeding is a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." (5 U. S. C. A. 1004). Cf. *Bersoff* v. *Donaldson*, 174 F. (2d) 494. The record made at such a proceeding is a transcript, supposed voluntarily by the applicant and submitted to the Commission for its expertise consideration which in its sound discretion we believe it may, or may not, grant, in the public interest as a matter of law. In consideration thereof the Commission is not usually required to weigh contested issues of fact such as are in-

herent in cases of adjudication contemplated by Section 5 of the A. P. A. The I. C. C. is only required to determine, within the expert judgment with which it is invested, whether the applicant has met the statutory policy requirements that authorize the issuance of such a certificate under the mandate of Section 207(a), *supra*. Such decision is essentially one of law, resting in part on statutory policy interests established by the Congress, having only prospective effects. The required determination by the Commission of the issue of public convenience and necessity, on the face of the statute, and under the legislative scheme established by the Congress, is not one made on existing facts, the result of present controverted rights and duties usually found in proceedings of an adjudicative character, as commonly understood, but is one made dependent upon policy interests as well as upon the showing made by a motor carrier, requiring the formation and determination of future rights and duties compatible with such policy. The material and ground for such a determination rests in part upon the transcript an applicant makes in such a proceeding, that is true, but a decision thereon having the above effect is the determination of a law proposition, and not one wholly resting in fact. Cf. *Communications Comm.* v. *W. J. R.*, 337 U. S. 265, and *Bowles* v. *Willingham*, 321 U. S. 503.

In the proceeding before the Commission, review of which is here sought, the decision of the Commission denying a certificate of authority to plaintiff under Section 207(a), *supra*, was wholly premised on the failure of plaintiff-applicant to meet the requirement of showing public convenience and necessity, as required by Section 207(a), *supra*. The only testimony presented on that subject was adduced by the plaintiff. A detailed statement thereof is not necessary. It is sufficient to state that at the time plaintiff filed its instant application for permanent authority it had been operating under temporary authority granted to it under Section 210(a), *supra*. The application for permanent authority covers practically identical service as authorized by the temporary grant. Both have reference to transportation of general commodities and

dangerous explosives. Plaintiff's own testimony established that as to explosives it had not, even under its temporary authority, transported any explosives from one authorized point on its temporary route since November, 1947, and that such service rendered by it, to and from certain other points, was only sporadic. Testimony of similar import was given by plaintiff's officers, concerning general commodities. The Commission determined from plaintiff's evidence alone that "applicant has failed to establish that the present or future public convenience and necessity required the proposed operations, and that the application should be denied" on that ground alone. "The effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373, 376. The decision so made by the Commission was "the equivalent of holding as a matter of law, in judicial parlance essentially as though raised upon demurrer" (337 U. S. 270-1) that issuance of a certificate of authority on plaintiff's application therefor would be inappropriate and not in the public interest. As above pointed out, such decision and order of the I. C. C. rested in part upon legislative policy considerations. A proceeding subject to such a determination and conclusion is not, in our opinion, an adjudication made upon the record within the ambit of Sections 5, 7 and 8 of the A. P. A. Cf. *Schenley Distillers Corp.* v. *U. S.*, 50 F. Supp. 491.

Plaintiff here admits "that the hearing it received or was accorded by the Commission was 'fair' in the sense that it was before an examiner who appeared to be competent and was willing to admit testimony" by all parties to the proceedings before the Commission. Most of the testimony received by said Examiner was not material to the issue of convenience and necessity determined by the Commission as above stated. Having received a "fair" hearing before the Commission, the fact that it was not conducted by an Examiner appointed under Section 11 of the A. P. A. did not convert it into an unconstitutional one, or deny the plaintiff "due process of law" in the inquiry and consideration of its said application. The fact that the Commission in its discretion granted a hearing before an Examiner in the employ of the Bureau of Motors Section,

instead of holding the hearing itself, does not alter the situation.

CONCLUSION OF LAW

We conclude that in "proceedings" on applications for certificates of authority, authorized by Section 207(a), Part II of the I. C. C. Act, determinable as a matter of law, as in the instant proceeding, formal hearings are not required as in "a case of adjudication required by statute to be determined on the record" contemplated in Sections 5, 7 and 8 of the A. P. A. So concluding, the temporary injunction heretofore issued herein appears to have been improvidently granted; it is now set aside, and vacated, and plaintiff's petition is ordered dismissed.

All concur.

/s/ JOSEPH W. WOODROUGH,
Judge, United States Court of Appeals.
/s/ R. M. DUNCAN,
Judge, United States District Court.
/s/ ALBERT A. RIDGE,
Judge, United States District Court.

Dated this 17th day of October, 1950.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 6344

RISS & COMPANY, INC., a corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

DECREE

This cause came on to be further heard on the 30th day of September, 1950, and was submitted on final hearing, by the parties by their respective counsel, on the pleadings, evidence, briefs and arguments of counsel, and was taken under advisement by the Court; and upon due consideration, it is now, this 17th day of November, 1950:

Ordered, adjudged and decreed, that (1) the temporary injunction, dated June 9, 1950, issued against the defendants herein, be, and the same is, now set aside and vacated; (2) the complaint herein be, and it is hereby, dismissed.

/s/ JOSEPH W. WOODROUGH,
Judge, United States Court of Appeals.
/s/ R. M. DUNCAN,
Judge, United States District Court.
/s/ ALBERT A. RIDGE,
Judge, United States District Court.

APPENDIX B

STATUTES INVOLVED

Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 stat. 237, 5 U. S. C. § 1001, *et seq.*

Sec. 2(d) 5 U. S. C. § 1001(d):

ORDER AND ADJUDICATION.—"Order" means, the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Sec. 2(e) 5 U. S. C. § 1001(e):

LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Sec. 5, 5 U. S. C. § 1004:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives——

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place,

and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of all parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be

applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Sec. 7, 5 U. S. C. § 1006:

In hearings which section 4 or 5 requires to be conducted pursuant to this section——

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8, 5 U. S. C. § 1007:

In cases in which a hearing is required to be conducted in conformity with section 7——

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers

make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 10, 5 U. S. C. § 1009:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken

on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Interstate Commerce Act, Act of February 4, 1887, as amended August 9, 1935, c. 498 49 stat. 543, 49 U. S. C. § 301, *et seq.*

Sec. 205(g) as amended May 24, 1949 Public Law 72, 81st Congress, approved May 24, 1949, 49 U. S. C. § 305(g):

(g) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I: *Provided,* That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of

a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Sec. 207, 49 U. S. C. § 307:

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Sec. 210(a), 49 U. S. C. § 310(a):

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good

cause, shall be valid for such time as the Commission shall specify, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Filed in the United States District Court November 20, 1950.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 479

RISS AND COMPANY, INC., a Corporation, *Appellant*,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Western District of Missouri

BRIEF OF RISS AND COMPANY, INC.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 439

RISS AND COMPANY, INC., a Corporation, *Appellant*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Western District of Missouri

---

BRIEF OF RISS AND COMPANY, INC.

OPINION BELOW

The opinion of the district court (R. 28-35) has not been reported.

JURISDICTION

The final decree of the three-judge district court was entered November 17, 1950 (R. 36). The petition for appeal was presented and allowed November 20, 1950 (R.

36, 39). The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253, 2101(b). Probable jurisdiction was noted February 26, 1951 (R. 42).

QUESTION PRESENTED

Whether an applicant for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle under section 207(a) of the Interstate Commerce Act is entitled to hearing and decision by the Interstate Commerce Commission in accordance with sections 5, 7, and 8 of the Administrative Procedure Act and before an examiner appointed and qualified under section 11 of that Act.

STATUTES INVOLVED

The pertinent sections of the Interstate Commerce Act and the Administrative Procedure Act are set out in the Appendix, *infra*, pp. 28-35.

STATEMENT

The Interstate Commerce Commission has more than a hundred employees of its Bureau of Motor Carriers engaged in the determination of motor carrier cases as examiners. The Commission has refused to relinquish administrative control of these employees by qualifying them as examiners under the Administrative Procedure Act. The issue in this case is whether the Commission can perpetuate this situation.

This is a direct appeal from a decree of a three-judge district court (R. 36) dismissing a complaint filed by Riss and Company, Inc. ("Riss") to enjoin, set aside and annul orders of the Interstate Commerce Commission denying to Riss certificates of public convenience and necessity to operate as a common carrier by motor vehicle and a hearing on its application in accordance with Sections 5, 7, and 8 of the Administrative Procedure Act and before an examiner appointed and qualified under section 11 of that Act (R. 1-5, 13-22).

Riss filed on August 22, 1947, an application with the Interstate Commerce Commission under section 207(a) of the Interstate Commerce Act to extend its operations in the transportation of general commodities to certain designated points beyond its then authorized routes; to authorize the transportation of dangerous explosives to, from and between all points and places then authorized to be served in the transportation of general commodities except explosives; and to authorize the transportation of dangerous explosives over irregular routes between designated additional points (R. 2, 6-7, 23, 25). Riss had been granted, some time prior to this application, temporary operating authority under section 210(a) of the Interstate Commerce Act to conduct the proposed operations pending determination of the application filed under section 207(a) (R. 1, 23, 25).

The application was set for hearing by the Commission (R. 2, 5-12, 23, 25) and hearings were held on November 5, 6 and 7, 1947, on December 6 and 7, 1947, and on May 19 and 20, 1948 (R. 2, 23, 25).

At these hearings, the Bureau of Motor Carriers of the Commission appeared as an intervenor in opposition to the application of Riss (R. 2, 23, 25). The Bureau of Motor Carriers actively participated in the proceeding in opposition to Riss both by argument and the introduction of evidence relating to the past operations of Riss, contesting the fitness and ability of Riss properly to perform the proposed service (R. 2, 23, 25, 29). In addition, two motor carriers and all Class I rail carriers in Western Trunk Line and Official Classification Territories, except the New York, Chicago, and St. Louis Railroad Company, appeared in opposition to the Riss application (R. 2, 23, 25).

Riss learned for the first time on May 20, 1948 that the examiner presiding at the hearings was not an examiner appointed and qualified under section 11 of the Administrative Procedure Act and was not otherwise qualified to

preside at hearings under section 7 of that Act (R. 2-3, 23, 25, 28-29). The examiner presiding at the hearing, and who subsequently issued a report recommending denial of the application (R. 3, 29), was an employee of the Section of Complaints, Bureau of Motor Carriers and responsible to the Chief of the Section of Complaints and the Director of the Bureau of Motor Carriers, which Bureau was actively opposing the application (R. 3, 23, 26, 29). Riss promptly objected to the hearing as contrary to and in violation of sections 5, 7 and 8 of the Administrative Procedure Act (R. 3, 23, 26, 29). All further proceedings leading up to and including the final order of the Commission denying the application were held over continued objection (R. 3, 23, 26, 29).

Riss petitioned the Commission on June 28, 1948 for a hearing and decision on its application in accordance with the requirements of sections 5, 7 and 8 of the Administrative Procedure Act (R. 3, 23, 26). This petition was denied by the Commission on the sole ground that the "proceeding was not required by statute to be determined on the record after opportunity for agency hearing" and, therefore, sections 5, 7 and 8 of the Administrative Procedure Act were not applicable (R. 3, 13-14). A petition for reconsideration of this order was likewise denied[1] (R.

[1] Riss at that point sought to obtain a judicial declaration of its right to a hearing and decision in accordance with the Administrative Procedure Act. On September 20, 1948, Riss filed in the United States District Court for the District of Columbia for declaratory judgment of its right to such a hearing and an injunction to require the Commission to afford Riss such a hearing. The District Court entered summary judgment for the Commission (unreported decision). On appeal the United States Court of Appeals for the District of Columbia Circuit remanded the case with instructions to dismiss the complaint on the ground that Riss had not exhausted its administrative remedies since a final order on the denial or grant of the application had not been made. The Court of Appeals, accordingly, did not rule on the applicability of the Administrative Procedure Act to the proceedings of the Commission. *Riss and Company, Inc.* v. *Interstate Commerce Commission,* 179 F. 2d 810 (1950).

3, 14). Thereafter, on March 3, 1948, the examiner filed a report and order recommending denial of the application (R. 3, 29). The Commission, Division 5 entered an order August 10, 1949 denying the application (R. 4, 14-20). The petitions of Riss to the entire Commission for rehearing and reconsideration and for a hearing on the application in accordance with the provisions of sections 5, 7 and 8 of the Administrative Procedure Act and before an examiner appointed under section 11 of that Act were denied by the Commission on April 19, 1950 (R. 4, 20-21).

Riss thereupon brought this action in the District Court for the Western District of Missouri, Western Division to set aside the denial orders of the Commission on the ground that Riss was entitled to hearing and decision on its application in accordance with section 5, 7 and 8 of the Administrative Procedure Act (R. 4). It was alleged that, because of the failure to comply with these provisions of the Administrative Procedure Act, the proceedings of the Commission were void (R. 4). Upon final hearing the specially-constituted district court, composed of Judges Joseph W. Woodrough, Richard M. Duncan and Albert A. Ridge, sustained the proceedings and orders of the Commission as lawful and proper and dismissed Riss' complaint (R. 28-36). The three-judge district court held that proceedings on applications for certificates of public convenience and necessity under section 207(a) of the Interstate Commerce Act and were not "adjudications required by statute to be determined on the record after opportunity for agency hearing within the meaning of sections 5, 7 and 8 of the Administrative Procedure Act" (R. 35) and that Riss was not entitled to the procedure provided in these sections before the Commission.

SUMMARY OF ARGUMENT

1. This Court has consistently held that the adjudication of applications for certificates of public convenience and necessity for operation as a common carrier by motor vehicle must be made upon the record after opportunity for hearing before the Commission. *American Trucking Associations* v. *United States*, 326 U.S. 77. The Commission has likewise recognized this requirement. This recognition of the requirement of a hearing is based upon the Commission's function as an administrative tribunal, the availability of judicial review and the necessity of affording an applicant due process of law. This Court has pointed out that a full and fair hearing is essential to bring into play the Commission's expert judgment and emphasized that, while judicial review of the orders of the Commission is available, the review is limited to questions of law, constitutional powers and basic requirements of proof in the hearing before the Commission. Moreover, Congress has, by amendment to the Interstate Commerce Act, specifically designated the class of cases in which the Commission may grant operating authority to motor carriers without hearings and formal proceedures. The authority so granted is limited by time and to emergency needs. More importantly this amendment extending the Commission's power to issue such temporary operating authority was enacted because of the requirement for hearings on applications for certificates. Section 207(a) of the Interstate Commerce Act, therefore, while not including in its terms the word "hearing" requires adjudication by the Commission on the record of a hearing.

2. Section 5 of the Administrative Procedure Act is applicable to hearings of the Commission on applications for certificates of public convenience and necessity to motor common carriers. The decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 determined that the section includes not only the hearings of administrative agencies where the statute, in terms, refers to a hearing

but also where, as here, the hearings are required by necessary construction of the statute. Further, a construction of the Administrative Procedure Act which exempts the Commission from the application of section 5 is destructive of any uniformity in the application of the provisions of the Act as between agencies performing similar functions and defeats one of the principal objectives of the Act. Accordingly, sections 5, 7 and 8 of the Administrative Procedure Act are applicable to the adjudication by the Commission of applications for certificates of public convenience and necessity.

ARGUMENT

I.

The Commission is Required by the Interstate Commerce Act to Adjudicate the Application Upon the Record After Opportunity for Hearing

1. This Court and the Commission Have Recognized the Requirement of a Hearing on Applications for Certificates

This Court and the Commission have held repeatedly that the adjudication by the Commission of an application for a certificate of public convenience and necessity under section 207(a) of the Interstate Commerce Act is required to be made on the record after opportunity for hearing. Section 207(a) of the Interstate Commerce Act, relating to the issuance of certificates does not in terms specify a hearing, *infra*, Appendix, p. 28. This Court and the Commission, however, in recognition of the statutory scheme of regulation which delegates "primary jurisdiction" to an expert tribunal whose decision is accorded "administrative finality"; and the statutory provision for judicial review of the determination of the Commission which is limited to issues of law, constitutional power and the basic requirements of proof, have repeatedly emphasized that the Com-

mission is required to reach its determination on the record of a hearing.

This Court emphasized the requirement of a full and fair hearing before the Commission on such an application in *American Trucking Associations* v. *United States*, 326 U.S. 77. In that case the court set aside an order of the Commission granting a certificate under sections 206(a) and 207(a) of the Interstate Commerce Act and remanded the case because of a failure to permit the introduction of certain evidence at the hearing. The Court noted the difficult problem facing the Commission in appraising the many factors involved in determining public convenience and necessity, and held (p. 86):

> . . . It is a problem which should be solved only after the receipt by the Commission under its usual rules of admissibility, of all available material evidence as to the probable effect of the proposals on the operations both of the proponents of and the protestants against the applications. Interstate Commerce Commission *v.* Louisville & N. R. Co., 227 U.S. 88, 91; Chicago Junction Case (Baltimore & O. R. Co. v. United States) 264 US 258, 264, 265. It is not enough that the railroad's motor operations are found by the Commission to be of a different character from over-the-road motor operations because they are integrated with railroad operation. The Commission must also consider the disadvantage to the public of a serious impairment of the non-rail motor carriers. Those affected are entitled to fully develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information.

It is apparent from the *American Trucking Associations* case, that the complex of problems raised by regulation under a standard of public convenience and necessity requires that the initial decision be reached by an expert body trained through experience. This Court, however, held that the expertise of the Commission must be applied to

the facts of the particular case and only after all interested parties have had the opportunity to present all relevant evidence. This can be accomplished only after full and fair hearing. See also; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 490.

In *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 this Court again emphasized the necessity of a hearing for the determination by the Commission of an application for certificates of public convenience and necessity. In the *Pierce* case applications had been filed under section 207(a) of the Interstate Commerce Act by two motor carriers for changes or extensions of their existing authority. The two applications sought much the same routes; were heard substantially at the same times and places; all parties including both applicants and all protestants appeared in both proceedings and were accorded full opportunity to present relevant evidence and to protect their interests. The Commission granted both applications and protestants sought to set aside the order of the Commission on the ground that the Commission had not considered each case exclusively on its own record but looked to both proceedings in forming its judgment. The Court sustained the Commission, but in passing upon the contention that the parties were deprived of a fair hearing held (pp. 527-529):

> . . . The principal cause of complaint in these respects is that the Commission did not consider each case exclusively on its own record but looked to the evidence in both proceedings in forming its judgment. If this is true and if it has resulted in substantial prejudice to the appellees, as might occur, for example, if the Commission were shown prejudically to have considered evidence bearing on one case which did not affect it and was presented in the other, and which the appellees were given no opportunity to meet, the orders or one of them, would be improperly grounded.
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> • • • • • • •

> Obviously it would be consistent neither with good sense nor, we think, with the type of hearing assured by the statute to force the Commission to put on such complete blinders. Whatever may be the limits outside which it cannot go in looking beyond the record in the particular proceeding at the stage of formulating its judgment, none certainly would go so far. And, given that the report contains all the essential findings required, cf. Florida v. United States, 282 U.S. 194, the Commission is not compelled to annotate to each finding the evidence supporting it. It is true that ordinarily an administrative agency will act appropriately in a proceeding of this sort, upon the record presented and such matters as properly may receive its attentions through "official notice." It is also true that this Court, in appropriate instances, has limited the use of the latter implement in order to assure that the parties will not be deprived of a fair hearing. See United States v. Abilene & S.R. Co., 265 U.S. 274, 286-290; Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 93, 94. . . .

It is to be noted that both *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 286-290 and *Interstate Commerce Commission* v. *Louisville & N.R. Co.*, 227 U.S. 88, 93, cited in the *Pierce* case, are cases expressly reversing the Commission for considering facts material to the determination of the Commission which were not adduced at the hearing.

The Commission has also consistently recognized in its proceedings, since the passage of the Motor Carrier Act in 1935, that a hearing on a record is essential to the exercise of the Commission's jurisdiction and power in the issuance of certificates. See *Monograph of the Attorney General's Committee on Administrative Procedure, Interstate Commerce Commission*, pp. 71-78. Indeed, in *Leonard Bros. Transfer & Storage Co., Inc., Extension*, 48 M. C. C. 773, 777, the Commission denied a certificate because some of the parties had not been given the opportunity to participate in the hearing. The Commission held that this amounted to a deprivation of the right of the parties to a full and fair hearing.

We submit that the Commission in respect to the issuance of certificates of public convenience and necessity like other agencies invested with authority to grant licenses to conduct business activity in accordance with specified legistive standards must, in its procedures, satisfy the requirements of due process. *Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 276; *Bratton* v. *Chandler*, 260 U.S. 110; *Interstate Commerce Commission* v. *Louisville & N.R. Co.*, 227 U.S. 88. Due process in this aspect requires that there be a full and fair hearing before the administrative agency and that the determination of the agency be made upon the record of that proceeding. *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38; *Morgan* v. *United States*, 304 U.S. 1; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126.

The Court below stated that there was implicit in the provisions of the Interstate Commerce Act a fundamental requirement that an applicant for a certificate be given a full and fair opportunity to present matter before the Commission (R. 32-33). Nevertheless, the Court ruled that the Commission was vested with "discretion" as to whether a certificate was to be issued and that the decision of the Commission rested only "in part" upon the record and is essentially a decision of a "law proposition" (R. 34).

The Court below in essence ruled that the determination of the Commission is not made upon the record of a hearing because the determination involves the exercise of an expert judgment in the intracacies of transportation problems. The fact that the Commission is an expert body informed by experience and charged with carrying out statutory policies does not minimize or eliminate the requirement for a hearing or permit the Commission to consider only a "part" of the record. The Commission as this Court held in *American Trucking Associations* v. *United States*, 326 U.S. 77, 86, must apply its expert judgment and the statutory policies to the facts of the particular case as developed on the record of the hearing. The evidence may be such that, in the exercise of the expert judg-

ment of the Commission, a grant or denial of the application is required. This judgment of the Commission, however, must be expressed in findings which have a rational basis in the record of the hearing. In no other way can it be determined whether the statutory standards and policies have been applied by the Commission to the case before it, *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-490. Recognition of the expertise of the Commission in the transportation field does not free the Commission to make determinations in such cases divorced from the record of the hearing and in its complete discretion. Virtually all administrative determinations are under such a theory, discretionary and based only in part upon the record of the hearing. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137, cited by the Court below, does not lay down such a rule. The *Pottsville* case related to the authority of the Federal Communications Commission to consolidate and to regulate order of precedence of applications before that Commission. This Court in that case, moreover, explicitly stated that the Communications Commission must afford the interested parties an opportunity for hearing. 309 U.S. 134, 144.

2. Statutory Provision Was Made by Congress, on the Recommendation of the Commission, for the Limited Cases in Which the Commission May Grant or Deny Operating Authority to Motor Carriers Without Hearings

The Motor Carrier Act, now Part II of the Interstate Commerce Act, as first enacted in 1935 did not provide for the issuance of operating rights to motor carriers where required by public need except by way of an application for a certificate of public convenience and necessity under section 207(a). The Commission recognized that applications under section 207(a) could be determined only after hearing and through the regular procedure of reports and

orders. There were, however, emergency situations where the need for motor carrier service was immediate and urgent and which would not await the regular procedure of hearings and orders. Accordingly, in 1938 the Commission recommended to Congress that provision be made in the Interstate Commerce Act to extend power to the Commission to grant, in its discretion and without hearings or formal procedure, temporary operating authority for limited periods of time. It is significant that the recommendation of the Commission that it be extended this power was based on the ground that hearings were required by the Interstate Commerce Act on applications under section 207(a) for certificates of public convenience and necessity. The recommendations of the Commission to Congress on this point stated:

> As the Act now stands, it is necessary, before new operations of a motor carrier can be undertaken to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The Act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future of public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.
>
> Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues there presented. The Act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants.
>
> Cases arise, and have been brought to our attention, where urgent need for interstate motor carrier service suddenly develops. The bringing of oil wells in a new field and conditions created by a flood or other

calamitous visitation are good examples, and there are others.[2]

Commissioner Eastman in testifying before the House and Senate Committees in support of these changes also emphasized that the discretionary power to grant without hearings temporary operating authority was necessary because under section 207(a) the Commission was required to hold hearings.[3]

Congress, in accordance with this recommendation of the Commission, enacted in 1938 section 210(a) of the Interstate Commerce Act, 52 Stat. 1238, which provides:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

[2] Recommendations of the Interstate Commerce Commission to Congress for Legislative Changes under section 204(a)(7), Motor Carrier Act of 1935 dated February 25, 1938. Hearings before Sub-Committee of the Committee on Interstate Commerce on S. 3606, 75th Congress, 3d Sess. 5 (1938).

[3] Hearings before Sub-Committee of the Committee on Interstate and Foreign Commerce on H. R. 9739, 75th Cong. 3d Sess. 11 (1938). Commissioner Eastman said, p. 11: "Now, section 9 enables the Commission to grant temporary authority to operate. At the present time in the case of an emergency arising . . ., we have no way in which we can give temporary authority to a motor carrier to operate in order to meet the need created by that emergency. The only thing a carrier can do in such a situation is to file an application for a certificate or a permit, and that must go through all the regular procedure." See also: Hearings before Sub-Committee of the Committee on Interstate Commerce on S. 3606, 75th Cong., 3d Sess. 19 (1938).

Congress thus confirmed the construction that the Commission is required to afford applicants for certificates of public convenience and necessity a hearing under section 207(a). The conditions under which Congress authorized the issuance of temporary authority without hearings are specifically limited to emergency situations and then only when no carrier service is available. The temporary authorities are also only of limited duration. These conditions upon the issuance and duration of operating authority without hearing are in sharp contrast to the standards of public convenience and necessity and the indefinite duration of certificates under section 207(a) where hearings and formal procedures are required.

3. The Statutory Provision for Judicial Review of the Determination of the Commission Requires Agency Decision on the Record of a Hearing

Section 205(g) of the Interstate Commerce Act provides that: "Any final order made under this part (Part II) shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission under Part I. . . ." This review is by a statutory three-judge court convened under 29 U.S.C. §§ 1336, 1398, 2284, 2321-2325. The review of orders granting or denying certificates under section 207(a) by such a court is limited to ascertaining whether there is warrant in law and the evidence for the determination. The findings of fact of the Commission, if supported by substantial evidence, are conclusive. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515; *American Trucking Associations* v. *United States*, 326 U.S. 77. Further, while the Commission is not compelled to annotate to each finding the evidence to support it, the Commission must make findings that are basic and essential to the operation of the statute. *United States* v. *Carolina Freight Carriers*, 315 U.S. 475, 489. It is apparent that the provision for

limited judicial review based upon whether the findings are supported by evidence necessarily requires a determination made upon the record of a hearing. Without a hearing and determination on the record by the Commission, the provision for judicial review would be meaningless. The Courts would be powerless to determine whether in any case the statutory standards had been applied or whether there was sufficient evidence to support the findings of the Commission. *Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, 303. Only through a full and fair hearing and a determination upon the record could a party test the sufficiency of the facts to support a finding since otherwise even though it appeared that the order was without evidence the deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information. *Interstate Commerce Commission* v. *Louisville & N.R. Co.,* 227 U.S. 88, 94. The statutory right of judicial review would become an empty form unless the Commission is required to afford applicants an opportunity for hearing and to reach its decision upon the evidence of record in such a hearing. It should be noted that the *Attorney General's Manual on the Administrative Procedure Act* recognizes that there need be no express requirement in the statute for decision "on the record" in order to bring the administrative adjudication within sections 5, 7 and 8 of the Administrative Procedure Act. This Manual points out that where provision is made for judicial review and the courts have held that the validity of the order must be determined, as here, on the administrative record, the adjudication is within sections 5, 7 and 8.[4]

The Interstate Commerce Act has consistently been held by this Court and the Commission to require determinations of applications for certificates of public convenience and necessity under section 207(a) to be made upon the

[4] Attorney General's Manual on the Administrative Procedure Act, 41-42 (1947).

record of a hearing before the Commission. This requirement is apparent from the statutory scheme of regulation embodied in the Interstate Commerce Act and the functions of the Commission as an expert body in the regulation of interstate transportation. Congress, moreover, has expressly recognized the requirement for hearing and decision on the record in these cases and made provision for the special conditions under which the Commission may act without hearings. Further, the statutory provision for judicial review is predicated upon a hearing and decision on the record by the Commission. There is no reason or justification for modifying the presently recognized right of motor carriers to such hearings and to determinations by the Commission on the record of such hearings.

II.

Section 5 of the Administrative Procedure Act is Applicable to Proceedings of the Commission on Applications for Certificates of Public Convenience and Necessity

Section 5 of the Administrative Procedure Act is the keystone to the procedure specified in other sections of the Act regarding administrative adjudications. If the adjudication is within section 5 of the Act, the agency must comply with the procedure detailed in sections 5, 7 and 8. Where agency adjudications are not required to be determined on the record after opportunity for an agency hearing, only the informal procedures specified in sections 4 and 6 of the Administrative Procedure Act apply. Sections 4 and 6, unlike sections 5, 7 and 8, do not provide for hearings before officers unconnected with the prosecuting or investigating functions of the agency, an opportunity to submit oral testimony or argument, decision on the record of the hearing, or other procedural rights given in sections 5, 7 and 8 of the Act. Moreover, as will appear, section 10 of the Administrative Procedure Act creates a substantial distinction in the extent of judicial review and in the func-

tions of the reviewing court between proceedings subject to section 5 and those where there is no statutory requirement for agency hearing. Section 10(e)(5) provides that, in any case reviewed on the record of a statutory administrative hearing, judicial review shall be limited to determining whether there is substantial evidence to support the decision of the agency. Section 10(e)(6), however, provides for a trial *de novo* of the facts in agency actions subject to judicial review where there is no statutory requirement of determination by the agency on the record of a hearing.

The Administrative Procedure Act thus creates a basic distinction between agency adjudications subject to section 5 and those which are not. The distinction is important not only as to the type of hearing officer, but also the conduct of the hearing and the subsequent procedure in reaching an agency decision. It is present at every step in the adjudicatory process and in the extent and manner of judicial review.

Section 5 of the Administrative Procedure Act applies to administrative "adjudication required by statute to be determined upon the record after opportunity for agency hearing." The Commission contends that proceedings on applications for certificates of public convenience and necessity are not administrative adjudications required by statute to be determined on the record after opportunity for an agency hearing. This argument rests upon the construction to be given the phrase "required by statute" as used in section 5. The Commission argues that this phrase literally limits the application of the Administrative Procedure Act to other statutes which, in terms, require a hearing. Thus the Commission urges that section 5 and the other adjudicatory sections of the Administrative Procedure Act are not applicable to its adjudication of applications under section 207(a) of the Interstate Commerce Act because section 207(a) does not contain the word "hearing" irrespective of the necessary judicial construction compelling a hearing.

This Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 decisively rejected such a limited construction of the Administrative Procedure Act. In that case an identical argument was made as to the phrase "required by statute" in an effort to exempt deportation hearings from the requirements of sections 5, 7 and 8 of the Administrative Procedure Act. In the *Sung* case, as in this case, it was urged that the absence of the word "hearing" in the Immigration Act, 39 Stat. 874, 889, as amended 8 U.S.C. § 155(a) exepted deportation proceedings irrespective of necessary judicial construction that a hearing was required. This Court held in the *Sung* case (p. 50):

> We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than are granted by it as a matter of expediency.

The present case falls clearly within those hearings covered by the Administrative Procedure Act. Indeed, the Commission does not deny that a hearing on an application for a certificate of public convenience and necessity is compulsory under the Interstate Commerce Act or claim that the hearings granted are merely given as a matter of grace through regulation, rule, custom or special dispensation. Other than the Interstate Commerce Act itself, there is no published rule or regulation of the Commission which affords applicants a hearing.

1. THE DETERMINATION OF AN APPLICATION FOR CERTIFICATES IS AN "ADJUDICATION" WITHIN THE MEANING OF THE ADMINISTRATIVE PROCEDURE ACT.

The Court below did not deny that a hearing was required under the Interstate Commerce Act in application cases. Indeed, the three-judge Court ruled that a hearing was implicit in the provisions of the Act and that this Court had laid down Constitutional requirements for formal hearings in such cases. The Court below held, however, that in application proceedings the "Commission is not usually required to weigh contested issues of fact such as are inherent in cases of adjudication contemplated by section 5 of the A.P.A." (R. 33). The Court below with this view of "adjudication" held that the "discretion" lodged in the Commission and the existence of statutory policy interests results in a determination based only "in part" upon the record of the hearing (R. 34). Hence, the Court concluded that the determination of the Commission in such cases was not "required by statute to be made upon the record" within the meaning of section 5 of the Administrative Procedure Act (R. 35).

This conclusion that the determination of the Commission is not an "adjudication" within the meaning of section 5 of the Administrative Procedure Act wholly overlooks the definition of "adjudication" contained in section 2 of the Act. Sections 2(d) and (e) of the Administrative Procedure Act specifically defines as "adjudication", agency process for the formulation of an order in licensing proceedings including the granting of a certificate. Moreover, the Court below is in error regarding the absence of contested issues of fact in these cases. The record of the present case consists of 958 pages of testimony and 264 exhibits and much of this record was made by the Commission itself as to facts which were strongly contested by the carrier. Also see the record in this Court in *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, No. 74, October term 1945.

It is apparent that the District Court elevated the expertise of the Commission in the application of statutory policies to individual cases into a holding that the determination of the Commission rests only "in part" upon the record of the hearing. Such a construction of the Administrative Procedure Act permits any agency to be exempt from the adjudicatory provisions of the Administrative Procedure Act. All administrative agencies concerned with the issuance of licenses or certificates to conduct operations in interstate commerce under a standard of public convenience and necessity are deemed to be informed by experience and to be the initial, if not primary, body entrusted with the application of statutory policies involved in regulation. It is precisely for this reason that the findings and conclusions of administrative tribunals are accorded "administrative finality" and are subject only to limited judicial review. To hold that this expertise precludes an administrative adjudication from being decided "on the record" destroys the entire purpose of the Administrative Procedure Act. It was because of the finality accorded such expert determinations particularly in fact-finding that the Administrative Procedure Act sought to impose standards of fairness and uniformity in proceedings before administrative agencies. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 37.

2. Exemption of the Proceedings of the Interstate Commerce Commission Would Result in an Unequal and Discriminatory Application of the Administrative Procedure Act

This Court held in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 41 that:

> Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse

agencies whose customs had widely departed from each other. We pursue this no further than to note that any exception we may find to its applicability would tend to defeat this purpose.

The decision of the Court below and the result that the Commission urges upon this Court manifestly creates an exemption for the Interstate Commerce Commission and defeats any uniformity of practice or procedure among the administrative agencies engaged in adjudicating applications for similar licenses or certificates. Under the interpretation advanced by the Commission, the Administrative Procedure Act is applicable to determinations of the Civil Aeronautics Board on applications for certificates of public convenience and necessity for the operation of aircraft [5] of the Federal Communications Commissions on applications for certificates of public convenience and necessity for operation of broadcasting facilities,[6] of the Federal Power Commission for the operation of gas pipe lines [7] or electric transmission to foreign countries.[8] These agencies in the denial of licenses or certificates in such cases comply with the Administrative Procedure Act since the statutes, in terms, require hearings. The Commission insists in the present case that notwithstanding the admitted requirement of a hearing in the identical functions of the Interstate Commerce Commission the provisions of sections 5, 7 and 8 of the Administrative Procedure Act are inapplicable because of the absence of the word "hearing" in section 207(a) of the Interstate Commerce Act. This construction of defendants-appellees does not conform with either the language or the purpose of the Administrative Procedure Act. The legislative history of the Admin-

[5] Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. § 481.

[6] Act of June 19, 1934, 48 Stat. 1085, 47 U.S.C. § 309.

[7] Act of June 21, 1938, 52 Stat. 824, as amended, 15 U.S.C. § 717f.

[8] Act of June 10, 1920, added August 26, 1935, 49 Stat. 847, 16 U.S.C. § 824a.

istrative Procedure Act makes clear that the Act was designed to apply "across the board" and that where a particular operation or function was exempted, similar functions in all agencies were exempted.[9] The Commission was not exempted from the bill. Indeed, Senator McCarran, Chairman of the Judiciary Committee, made clear that the Interstate Commerce Commission had been fully considered and was placed on an equal position with all other agencies with respect to the Act. Senator McCarran stated during consideration of the Act by the Senate:

> . . . The Committee has not deviated from the policy of dealing with types of functions as such, and the bill in no case deals with administrative agencies by name. For example, certain war and defense functions are exempted under the bill, but there is no exemption of War or Navy Department in the performance of their other functions. Obviously, it would be folly for the committee to presume to distinguish between 'good' agencies and 'bad' agencies, and there is no attempt in the bill to make such a distinction.
> To cite another example, the legitimate needs of the Interstate Commerce Commission have been fully considered, but the Commission has not been placed in a favored position over other Government agencies by exemption from the bill . . . 92 Cong. Rec. 2150 (1946).

3. Applicants Are Entitled to a Trial de Novo if the Commission is Not Required to Adjudicate Applications on the Record of a Hearing

The contention that the adjudication by the Commission of an application for a certificate of public convenience and necessity is not required to be made upon the record of a statutory hearing carries with it the extraordinary corrollary that Congress intended to change the long established and existing judicial review and afford applicants a trial *de novo* before the district courts. The legislative

[9] H.R. Rep. No. 1980, 79th Cong. 2d Sess. 16 (1946); 92 Cong. Rec. 2150 (1946).

history demonstrates that the reference to "adjudication required by statute to be determined on the record after opportunity for agency hearing" in section 5 was designed to eliminate only those matters of administrative routine and similar matters where a hearing traditionally or intentionally was not required. Moreover, it was understood by Congress that limiting section 5 to cases where hearing was not required covered all formal adjudications except where existing law permitted a trial *de novo*. Section 5 was thus made applicable to those adjudications where the statute, in terms, or by necessary construction, required a hearing since the administrative hearing is the only opportunity afforded the parties to develop the facts of any particular case. This application of section 5 is spelled out in detail in the legislative history of section 5 and again in the legislative history of section 10 relating to judicial review.

Section 10(e)(5) of the Act provides the standard of substantial evidence in judicially reviewing agency adjudications where the statute requires a hearing. Section 10(e)(6) provides that the standard of "unwarranted by by the facts" will be applicable in a trial *de novo* in cases where the agency action is not required by statute to be made upon the record after opportunity for agency hearing. An opinion that there is no statutory requirement of a hearing within the meaning of the Administrative Procedure Act unless the statute, in terms, requires it, also raises the problem of a change in the long established mode of judicial review in this case where the statute has necessarily been construed to require a hearing. *American Trucking Associations* v. *United States*, 326 U.S. 77; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475. Only if the phrase, "required by statute", is read as including statutes which have been construed to require hearing can the Administrative Procedure Act be read as a harmonious whole and unreasonable results avoided.

It is evident from the statements during the debates and from the reports of the Committees that, if the statute does not require a hearing, Congress understood that a trial *de novo* was available. The Report of the House Committee on the Judiciary explains the effect of the relationship of sections 5 and 10 of the Administrative Procedure Act as follows:

> "Substantial evidence" means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues * * *
>
> The sixth category, respecting the establishment of facts upon trial *de novo*, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a statutory agency hearing . . . In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court. H.R. Rep. No. 1980, 79th Cong. 2d Sess. 45 (1946).

See also to the same effect the statement of Congressman Walter, Chairman of the House Judiciary Committee during consideration of the bill in the House of Representatives, 92 Cong. Rec. 5651 (1946); and the explanation in the Senate Judiciary Committee print of the bill, Sen. Doc. No. 248, 79th Cong. 2d Sess. 22, 39-40 (1946).

A consideration of these interrelated provisions of the Administrative Procedure Act thus demonstrates that section 5 was intended to include not only hearings provided by the express language of the statute but also where the

statute had been construed to require a hearing. The narrow construction offered by the Commission carries with it the presumption that the entire mode of judicial review in this important administrative proceeding is to be eliminated. The issuance of certificates of public convenience and necessity by the Interstate Commerce Commission are to be tried *de novo* in the District Court. Such a radical departure from the accepted methods of review is not necessary if the phrase "required by statute" is interpreted as Congress intended. A construction of section 5 which includes these administrative adjudications, which are required, by construction of the statute as well as by its terms, to be determined on the record of a hearing, is consistent with this legislative purpose and avoids unreasonable results.

CONCLUSION

The application of the Administrative Procedure Act to the adjudication of applications for certificates of public convenience and necessity is of importance to motor carriers. The granting or denial of such applications—the limitations imposed on the type of commodity which may be transported and the restrictions governing the routes and points to be served—involve economic life or death to the individual carrier. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488. Furthermore the granting or denial of such certificates determine the manner and extent to which motor carriers are to be permitted to utilize inherent advantages of highway transportation in competition with other types of carriers.

The Interstate Commerce Commission is the forum in which the various types of carriers vigorously urge their competing and conflicting interests. Where, as here, the Bureau of Motor Carriers actively "intervenes" in opposition to an applicant, the need of an impartial hearing officer is intensified in order to prevent any undue pressure being brought to bear. It is essential, therefore, that the

examiner be separated, as provided in the Administrative Procedure Act, from any possible dependence upon other officers of the agency who may reflect preconceived notions as to a particular case or class of cases. *Cf. Universal Camera Corp.* v. *National Labor Relations Board*, No. 40 October Term, 1950, decided February 26, 1951.

It is submitted that the Commission is required by the Administrative Procedure Act to afford motor carriers hearing and decision in accord with the standards prescribed by that Act. The hearing accorded to Riss was conducted by a disqualified official and was a nullity. Accordingly, the denial order of the Commission cannot be sustained and the order should have been set aside.

Respectfully submitted,

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APPENDIX OF STATUTES

Interstate Commerce Act, Act of February 4, 1887, as amended August 9, 1935, c. 498 49 stat. 543, 49 U.S.C. § 301, *et seq.*

Section 205(g) as amended May 24, 1949 Public Law 72, 81st Congress, approved May 24, 1949, 49 U.S.C. § 305(g):

(g) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I: *Provided*, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Section 207, 49 U.S.C. § 307:

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Section 210(a), 49 U.S.C. § 310(a):

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority shall be granted thereafter.

Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 stat. 237, 5 U.S.C. § 1001, *et seq.*

Section 2(d), 5 U.S.C. § 1001(d):

ORDER AND ADJUDICATION.—"Order" means, the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Section 2(e) 5 U.S.C. § 1001(e):

LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Section 5, 5 U.S.C. § 1004:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings

in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of all parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to

proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7, 5 U.S.C. § 1006:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8 and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and request filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8, 5 U.S.C. § 1007:

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On ap-

peal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. Section 10, 5 U.S.C. § 1009:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof,

any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 11, 5 U.S.C. § 1010:

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommended legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 479

RISS AND COMPANY, INC., A CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (unreported) is set forth in the transcript (R. 29–35). The report of the Interstate Commerce Commission (R. 14–19) is briefly referred to in 49 M. C. C. 810.

JURISDICTION

The judgment of the District Court was entered on November 17, 1950 (R. 35). The petition for appeal was presented and allowed on

November 20, 1950 (R. 36, 39). The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted February 26, 1951.

QUESTIONS PRESENTED

Whether the District Court erred in sustaining as sound the Commission's ruling that the proceeding instituted by appellant for a certificate of public convenience and necessity under section 207 of the Interstate Commerce Act is not one "required by statute to be determined on the record after opportunity for an agency hearing and, therefore, is not a case of adjudication which is required by section 5 of the Administrative Procedure Act to be heard and decided in conformity with sections 7 and 8 of that Act, and (that) the provisions of sections 5, 7 and 8 of that Act do not apply to the said proceeding" (R. 13–14.)

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal from the judgment (R. 35) of a specially constitued District Court, United States District Court for the Western District of Missouri, sustaining as valid the procedure followed and orders entered by the Com-

mission in No. MC–200 (Sub–No. 84), *Riss & Company, Inc., Extension-Explosives* (R. 13–22).

Appellant (hereinafter called Riss) is a common carrier by motor of property operating over the highways under certificates issued by the Commission which collectively cover the transportation (1) of general and specified commodities over regular and irregular routes between points in an extensive territory extending from the Atlantic Seaboard to Colorado and Texas points, and (2) of dangerous explosives to and from a number of points, principally west of Chicago and St. Louis. At the time of the proceeding here involved, Riss also held temporary authorities, granted under section 210 (a), covering, for the most part, the transportation for which it sought permanent authority by the application instituting the proceeding.

Generally described, Riss' application, filed August 22, 1947, and amended September 3, 1947, sought a certificate of public convenience and necessity under section 207 authorizing (1) the extension of its general commodity operations to certain points in Kansas, Oklahoma, and Colorado beyond its presently certified routes and points, (2) the transportation of dangerous explosives to, from, and/or between all points presently authorized by certificates to be used by Riss only for general commodities, and (3) the transportation of dangerous explosives by irregular routes between Crane, Ind., and certain points

in Virginia and New Jersey (Appendix to Commission's report, R. 21–22). By order, the Commission set Riss' application for hearing before an examiner of the Commission. Two motor carriers and all Class I railroads in western trunkline and official classification territory intervened in opposition to the application. The Commission's Bureau of Motor Carriers was represented by counsel who participated in developing facts concerning Riss' failure to observe the Commission's safety rules and regulations. Hearings were held before the examiner on three successive days in November and two in December, 1947. Upon Riss' petition, further hearing was held on May 19 and 20, 1948. On May 20, 1948, Riss objected to the hearing as being contrary to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act, 15 U. S. C., secs. 1004, 1006–7, in that the examiner had not been duly appointed under section 11 of that Act. Further hearings were held over its objection.

On June 28, 1948, Riss filed a petition before the Commission requesting a hearing on its application for certificates of public convenience and necessity in accordance with the requirements of sections 5, 7 and 8 of the Administrative Procedure Act. By orders of the Commission dated July 28, and September 7, 1948 (R. 13–14), the Commission denied the petition of Riss for the reason that the "proceeding was not required by

statute to be determined on the record after opportunity for agency hearings and, therefore, is not a case of adjudication which is required by section 5 of the Administrative Procedure Act to be heard and decided in conformity with sections 7 and 8 of that Act, and the provisions of sections 5, 7, and 8 of that Act do not apply to said proceedings."

Thereafter, the examiner issued a report and order recommending that Riss' application be denied and the Commission, by Division 5, entered its report and order dated August 10, 1949 (R. 20) denying the application.

On December 5, 1949, Riss filed with the Commission a petition for rehearing and reconsideration of the order of the Commission, by Division 5, and on February 27, 1950, a further petition for a hearing in accordance with the provisions of sections 5, 7 and 8 of the Administrative Procedure Act. By order dated April 19, 1950, the Commission denied the petitions (R. 20–21).

After the Commission's first denial of its petition for a hearing under the provisions of sections 5, 7 and 8 of the Administrative Procedure Act, Riss on September 30, 1948, filed a complaint in the United States District Court for the District of Columbia seeking a mandatory injunction requiring the Commission to conduct the hearing in accordance with the provisions of said sections of that Act. The District Court in an

Informal Memorandum of Judge Letts (not reported) denied Riss' motion for a preliminary injunction stating in part:

> 3. The proceeding in issue is not required by statute to be determined on the record after opportunity for an agency hearing and, therefore, is not a case of adjudication which is required by Section 5 of the Administrative Procedure Act to be heard and decided in conformity with Sections 7 and 8 of that Act, and the provisions of Sections 5, 7 and 8 of that act do not apply to the proceeding.

Upon appeal, the Court of Appeals for the District of Columbia reversed on the ground that Riss had failed to exhaust its administrative remedy and, therefore, its application was premature. *Riss & Co., Inc.* v. *Interstate Commerce Commission, et al.*, 179 F. 2d 810.

On May 2, 1950, Riss brought suit (R. 1) in the court below to set aside the Commission's orders of August 10, 1949 and April 19, 1950, on the grounds, substantially, that since the Commission had not conducted the hearings pursuant to sections 5, 7 and 8 of the Administrative Procedure Act, the proceedings were void, and, further, that the Commission's findings of fact and conclusions of law, on which it based its denial of Riss' application for a certificate, were arbitrary, capricious, contrary to the evidence and violative of the provisions of the Interstate Commerce Act

applicable to Riss' application (R. 4). Answers were filed by the United States (R. 25) and by the Commission (R. 25). Hearings were held before the court on September 30, 1950 (R. 36). A certified copy of the record made before the Commission was introduced (R. 41). On October 17, 1950, the court rendered and entered its opinion together with its findings of fact and conclusions of law, sustaining the Commission's orders as in all respects valid (R. 28–35). On November 17, 1950, the court entered its judgment dismissing the complaint (R. 36).

ARGUMENT

I

The provisions of Sections 5, 7 and 8 of the Administrative Procedure Act do not apply to the Commission proceeding instituted by Riss' application for a certificate of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act

It should be emphasized at the outset that Riss' grievance is not that it was denied a hearing in the Commission proceeding. Riss was, in fact, afforded a full, fair and impartial hearing consuming seven days, this being frankly admitted by his counsel near the close thereof on the seventh day.[1] Riss contends that the hearings on which the Commission's orders denying its application were based were not held in accord-

[1] Pages 924–925 of testimony before the Commission included in the record on appeal (R. 42).

ance with sections 5, 7 and 8 of the Administrative Procedure Act[2] (hereinafter called the Procedure Act), this particularly because the Commission Examiner was not appointed or qualified under that Act, and because an attorney of the Legal and Enforcement Section of the Commission's Bureau of Motor Carriers participated in the proceeding both by introducing testimony and by argument, oral and in briefs.

The hearing examiner requirements embodied in sections 7 and 11 of the Procedure Act and the separation of functions requirements of section 5 (c) as well as the provisions of section 8 are applicable only to cases of adjudication in which a hearing is "required by statute," i. e., some statute other than the Procedure Act. The introductory clause of section 5 limits application to "every case of adjudication *required by statute* to be determined on the record after opportunity for agency hearings * * *." Sections 7 and 8 by their express terms are applicable only to hearings which sections 5 and 4 require to be conducted pursuant thereto.

Thus, while section 5 provides in its paragraph (a) for notice of an agency hearing in the way there particularized, and in its paragraph (b) for certain procedure to obtain settlement of "any controversy by consent" and, failing in that, for *"hearing and decision upon notice and*

[2] 60 Stat. 237, 5 U. S. C. 1004, 1006–7.

in conformity with sections 7 and 8," all is subject to the introductory clause of section 5, limiting the application of its said paragraphs (a) and (b) and also (c), "Separation of functions," to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing x x x."

As to section 4,[3] relating to rule making, this section for the most part recognizes the usual principles that rule making (in its usual sense and meaning) may be undertaken after notice of general kind and after opportunity afforded interested persons to participate in informal procedure; and the section makes only one exception to the informal procedure by prescribing, instead, the procedure laid down in sections 7 and 8. But here, too, such procedure under sec-

[3] SEC. 5, "Adjudication" (and not section 4, "Rule Making") is pertinent to the Commission's action here in denying Riss' application for a certificate, this being shown by the definitions in paragraphs (d) and (e) of section 2, reading as follows:

(d) *Order and Adjudication.*—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) *License and Licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission. "Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

tions 7 and 8 is made to apply only "where rules are *required by statute* to be made on the record after opportunity for an agency hearing x x x" (sec. 4 (b), Procedure Act).[4]

Coming then, to section 7, while this section provides, among other things, that "there shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners *appointed as provided in this Act*" (sec. 11), still it will be seen from the opening clause of the section that such requirement and the others that follow are made to apply only "In hearings

[4] Nevertheless, such exception whereby the procedure under sections 7 and 8 is made to apply covers a wide field. For, "rule making", as defined in sec. 2 (c), includes, among other things, the approval or prescription for the future of rates (of all sorts), reorganization of financial structures, allowances, valuations, and practices bearing upon any of the foregoing, all of which are subject to hearings under express requirements of the Interstate Commerce Act and all, when assigned to an examiner, are assigned to a hearing examiner appointed pursuant to section 11 of the Procedure Act. Attached hereto, marked Appendix B, is a copy of a Commission order (published in the Federal Register, June 1947) amending its order or rules as to the assignment of work by providing that all proceedings in which, by provisions of the Procedure Act, a hearing is required to be conducted in conformity with section 7, and a decision to be made as provided in section 8 of that Act, shall be reserved to the Commission for initial decision (as distinguished from recommended decision) and for such purpose of initial decision may be assigned to a Division, individual Commissioner, or board as provided in section 17, I. C. Act. Among other things, the order excepts from such reservation proceedings required to be submitted to joint boards by section 205 of the I. C. Act.

which sections 4 or 5 requires to be conducted pursuant to this section." And similarly as to section 8, the opening clause thereof limits application of that section's requirements to "cases in which a hearing is required to be conducted in conformity with section 7". Section 11, it will be noted, applies only to the appointment of such "examiners as may be necessary for proceedings pursuant to sections 7 and 8." Thus, none of these sections is applicable to Riss' application for a certificate of convenience and necessity under section 207 of the Interstate Commerce Act, the reason being that that statute does not require a hearing upon such an application.

In his brief (p. 17) Riss says:

> Section 5 of the Administrative Procedure Act is the keystone to the procedure specified in other sections of the Act regarding administrative adjudications. If the adjudication is within section 5 of the Act, the agency must comply with the procedure detailed in sections 5, 7 and 8.[8]

[8] The immediately succeeding sentences in the brief seem to indicate the view that section 4, relating to "rule making", provides only for informal procedures, whereas, as just above shown, the last sentence of section 4 (b) provides: "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." And, as pointed out in footnote 4, *supra*, in view of the definition of "rule making", such exception in section 4, whereby the procedure under sections 7 and 8 is substituted and made to apply, covers a wide and important field of the Commission's activities.

Taken together with subsequent argument, this statement presumably means that only as the adjudication is within section 5, is the agency required to comply with the procedure detailed in the sections mentioned, including section 7's requirement that in such case a hearing examiner be one appointed pursuant to section 11. The legislative history of the Procedure Act[6] is replete with evidence that sections 5, 7, 8 and 11 of the Act were intended to apply only to cases of adjudication in which Congress had by some other statute specifically required opportunity for an administrative hearing. Thus, the Senate Judiciary Committee's Comparative Print of S. 7 and H. R. 1203, Sen. Doc. 248, contains the statement that the provisions of section 7 respecting hearings "are not designed to require hearings where Congress has not already done so by statute."

Similarly, there are statements by the then *Chairman of the American Bar Association's Committee on Administrative Law*, Sen. Doc. 248, p. 79;[7] in the *Senate Committee Report*, id.

[6] The entire legislative history of the Act is printed in Administrative Procedure Act, Legislative History, 79th Cong., 1944–46, Senate Document 248, 79th Cong., 2d Session.

[7] Mr. McFarland: "• • • But none of the measures, I think, with one exception, provides that the procedure in respect to adjudication shall apply to any case unless Congress has specifically, by some other statute, required an administrative hearing. But if the case is required by statute

p. 202;[8] in the *House Judiciary Committee Report*, id. p. 251, 260;[9] in the remarks of *Representative Walter*, sponsoring the bill on the floor of the House of Representatives, id. p. 359;[10]— all, in substance, stating that the language of section 5 limits the operation of the statute to cases in which other statutes require a hearing. See

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to be heard by an administrative agency, all of the various bills provide that the hearing shall be conducted in a certain way. First, upon notice; second, upon specified procedure."

[8] "The general limitation of this section [sec. 5] to cases in which other statutes require the agency to act upon or after a hearing is important. All cases are nevertheless subject to sections 2, 3, 6, 9, 10 and 12 so far as those are otherwise relevant.

The numbered exceptions remove from the operation of the section even adjudications otherwise required by statute to be made after hearing. The first, where the adjudication is subject to a judicial trial de novo, is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision. * * *."

[9] "This section [5] is limited to cases in which other statutes require an agency to act upon or after a hearing, but even then the numbered exceptions remove from the operation of the section adjudications otherwise required by statute to be made after hearing or opportunity therefor. The first, where the adjudication is subject to a judicial trial de novo, is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision."

[10] "Section 5 relates to the judicial function of administrative agencies where they decide specific cases respecting compliance with existing law or redress under existing law. It applies, however, only where Congress by some other statute has prescribed that the agency shall act only upon a hearing and, even in that case, there are six exceptions."

also *Attorney General's Manual on the Administrative Procedure Act*, p. 41.

The Procedure Act derives largely from two Bills introduced in the 77th Cong., 1st Sess., S. 674 and S. 675, both of which required, *inter alia*, hearings before hearing commissioners in "proceedings wherein rights, duties or other legal relations are *required by law* to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing." During hearings held on S. 674 and other bills by a Senate Judiciary Subcommittee, it was suggested that the phase "required by law" was ambiguous and should be made more definite and certain. Thus, Interstate Commerce Commissioner Aitchison stated (Senate Hearings on S. 674 et seq., 77th Cong., 1st Session (1941) 453–454:

> For the purposes of sections 302–309, is the proceeding one in which a hearing is held pursuant to a requirement of law that the matter shall be determined only after opportunity for hearing, or is it the intent to cover cases where the law specifically holds out no such privilege of opportunity for hearing, but the agency as a matter of convenience or discretion itself ex gratia offers the opportunity?
>
> This should be made unmistakably clear * * *.

Referring to the same phase "required by law" Solicitor General Biddle suggested that the words "statute or Constitution" be substituted for the word "law". He pointed out (*ibid.*, p. 1456) that:

> In some cases certain agencies had ex gratia by regulations imposed upon themselves requirements of formal procedures though the applicable statute made no such requirement. In order to exclude the possibilities that such procedures come within Title III, the amendment is desirable.

As has been above shown, section 5 of S. 7, and of the Procedure Act as enacted, expressly limited the adjudicatory provision to "hearings required by statute"; and Riss does not dispute that the effect of this was to limit the application of sections 7 and 8 to cases where the agency statute requires hearings (Br. 17), although, based on this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, and others, he does apparently contend (Br. 18–19) that "necessary judicial construction" compels a hearing on an application for a certificate under section 207 (a) of the Interstate Commerce Act. In the *Sung case, supra*, this Court held, *inter alia*, that the difficulty with "the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation"; that it "was under compulsion of the Constitution that

this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here for some time even if illegally" (p. 49); that "the limitation to hearings 'required by statute' in section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion"; that it did not think the limiting words render the Act "inapplicable to hearings, the requirement for which has been read into a statute by the Court to save the statute from invalidity"; that "they exempt hearings of less than statutory authority, not those of more than statutory authority" (p. 50).

1. Even if the Commission, in adjudicating the application for a certificate, had accorded Riss informal procedure only, it would have denied Riss nothing required by the agency statute or compelled by the Constitution

The contentions and argument in Riss' brief, including assertions in the opening paragraph of the "Statement" (Br. 2), seem colored by his failure to note that "rule making", as defined by the Procedure Act, covers, by special mention, functions of the Commission of outstanding importance, including notably its function of prescribing future rates and rules and practices affecting rates.[11] So far as Riss' application for

[11] Pages 33–34, Attorney General's Manual on the A. P. A., 1947.

a certificate is concerned, he is correct in his statement to the effect that section 5 of the Procedure Act is the "keystone" governing whether the procedural requirements of sections 7 and 8 apply (Br. 17). But, while section 4, "Rule Making", unlike sections 5, 7 and 8, specifies in its early provisions only informal procedures, the last sentence of section 4 (b) contains an exception, making the requirements of sections 7 and 8 apply in place of such informal procedures "Where rules are required by statute to be made on the record after opportunity for an agency hearing * * *."

Not only does Part II of the Interstate Commerce Act require hearings in all manner of rate cases (including cases involving the joint rates of motor carriers with carriers of other kinds) where the Commission, if finding that the existing rates, or rules or practices affecting the rates, violate the Act's provisions against unreasonableness, unjust discrimination or undue prejudice, determines and prescribes the future rates, rules and practices (sec. 216 (e), (f) and (g)), but it also requires hearings before the Commission may enter an order in *any* proceeding involving violation of *any* provision of said part or of any requirement of the Commission thereunder (sec. 204 (c)). Also falling within the general class of provisions requiring hearings in matters involving violation of the Act's provisions or of the Commission's requirements thereunder is section

212 (a) which requires a hearing and finding of "wilful" violation before a certificate of public convenience and necessity (once issued and effective) may be suspended, changed or revoked. In no case as to which Part II (i. e., the agency statute) requires a hearing does the Commission assign an examiner other than one appointed pursuant to section 11 of the Procedure Act. But, in sharp contrast to the cases, and their subject matter, as to which Part II makes hearings a prerequisite to the entry of orders, are application cases such as that of Riss whereby the applicants seek certificates granting them the privilege of conducting the business of transporting freight over the public highways.

While Riss concedes that section 207 (a), relating to the issuance of certificates does not in terms require a hearing (Br. 7) and, while he points to no other provision of Part II that does, he contends that under decisions of this Court and the Commission's own construction the Interstate Commerce Act requires hearings on applications for certificates under section 207 (a). As to the asserted construction of the Commission, Riss relies principally (Br. 12–15) on statements contained in the Commission's 1938 recommendations to Congress for changes in the Motor Carrier Act,[12] which recommended changes included a proposed amendment (now section 210 (a)) em-

[12] 75th Cong., 1st Sess., Senate Document No. 154, Jan. 5, 1938.

powering the Commission to grant temporary authorities without hearings or other proceedings, the purpose being to enable the Commission to meet emergency situations such as result from the opening of new oil fields, from floods or other calamitous visitations or from other causes occasioning urgent need for motor carrier service. In recommending that it be empowered to grant such temporary operating authorities, the Commission emphasized that, as the Act then stood, it was necessary to obtain a certificate, or a permit, before new motor carrier operations could be undertaken; and, on this point, its recommendations contained the statements quoted in Riss' brief (p. 13), to wit:

> As the Act now stands, it is necessary, before new operations of a motor carrier can be undertaken to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The Act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.
>
> Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues there

> presented. The Act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants.

* * * * *

Following the quotation from the Commission's legislative recommendations and after mention of testimony of Commissioner Eastman before the House and Senate Committees, Riss' brief states (pp. 14–15) that "Congress, in accordance with this recommendation of the Commission, enacted in 1938 section 210 (a) of the Interstate Commerce Act * * *"; that "Congress thus confirmed the construction that the Commission is required to afford applicants for certificates of public convenience and necessity a hearing under section 207 (a)"; that the conditions, specifically limiting the issuance of temporary authority without hearings to emergency situations and for periods of limited duration, "are in sharp contrast to the standards of public convenience and necessity and the indefinite duration of certificates under section 207 (a) where hearings and formal procedures are required."

However, the Commission, in making its 1938 legislative recommendations, was faced, not only with urgent need that it be empowered to grant temporary operating authorities without hearings

or other proceedings, but also with requirements for hearings which retarded and made unnecessarily onerous its task of disposing of applications and other matters. In speaking of the necessity for public hearings, the Commission was referring to the Act's provisions as they then stood and not reading a requirement for hearings into proposed amendments which it was recommending. At page 3 of its legislative recommendations (Document No. 154, 75th Cong., 1st Sess. Senate), just following its discussion of the need for a provision enabling it to grant temporary operating authorities, the Commission took up the need for changes in section 213, Part II of the Interstate Commerce Act, which section required that its approval be obtained for transactions involving mergers, purchases, leases and acquisitions of control of motor carriers. After pointing out that the provisions of section 213 were modelled after the similar provisions of section 5 of Part I with reference to railroads and accordingly provided for like procedure including public hearings; that, while such procedure was appropriate and necessary in passing upon proposed railroad unifications, that was by no means always the case in approving like transactions involving motor carriers, the Commission said (*idem*, p. 4):

> We believe that in a considerable number of instances there is no real need for a public hearing in connection with an applica-

> tion under section 213, and that one should be required only where we deem it necessary in order to determine whether the findings which are requisite to a grant of authority may properly be made.[13]

Just following the above, the Commission made its first mention of need for change in section 205 (f) of Part II (now lettered sec. 205 (e)),[14] saying:

> Below we recommend a corresponding change in section 205 (f), but even with this change that paragraph will still require notice of all proceedings to be given interested parties and State authorities, with opportunity to make representations to the Commission. This will furnish a check on the need for a hearing.

Continuing with its discussion of this recommended change, the Commission said (idem, p. 6):

> Section 205 (f) of the act is as follows: (f) In accordance with rules prescribed by the Commission, reasonable notice shall be accorded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are, or are proposed to be,

[13] The changes in section 213 which the Commission recommended are shown at pages 14–15 of said Document 154, and were enacted into law June 29, 1938, 52 Stat. 1239–40.

[14] 54 Stat. 922.

conducted, and opportunity for hearing and for intervention in connection with any such proceedings shall be afforded to all interested parties.

In view of the amendments above recommended, which would eliminate the necessity for a public hearing in certain instances, and in view of the fact that the act in other instances permits, except for this paragraph, action without a public hearing, we recommend that the last part of this paragraph be changed to read as follows:

* * * and opportunity for intervention in connection with any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

There is a precedent for this in section 20a (6) of part I of the Interstate Commerce Act with reference to applications of railroad companies for authority to issue securities. That paragraph requires the Commission to serve notice of applications upon governors, gives the appropriate State authorities the right "to make before the Commission such representations as they may deem just and proper"; and then provides that the Commission "may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

There is no reason to believe that the Commission will be arbitrary in omitting

hearings. Not only would this be contrary to all of the traditions of the Commission, but it would be rendered difficult by the notice and opportunity for representations which section 205 (f), as amended, would still require, as well as the full opportunity which the act affords interested parties to petition for reconsideration of a decided case and to seek hearing or rehearing in connection therewith. Arbitrary refusal to grant a hearing where one is needed would also expose the Commission to much risk of court reversal.

It will be noted that the Commission, in recommending the change in section 205 (f), precedes the same by the statement that it is making the recommendation "In view of the amendments above recommended, which would eliminate the necessity for a public hearing in certain instances, and in view of the fact that the act in other instances permits, except for this paragraph, action without a public hearing * * *." The amendments, eliminating the necessity for hearings in certain instances, which the Commission had already recommended were the amendment empowering it to grant applications for temporary authority and the amendments in connection with applications under section 213, eliminating hearings except as the Commission deemed them necessary in order to enable it to make the requisite findings. The instances in which the Act permitted, except for paragraph

(f) of section 209, action without public hearing, were notably other application cases, such as applications for certificates under section 207 (a) or for permits under section 209. Clearly such "instances" did not include rate cases or other cases involving violation of the Act's provisions or requirements of the Commission thereunder since, in all such cases, Part II expressly requires hearings and findings of violation before the Commission may prescribe the future rates or practices or enter an order requiring compliance (see p. 17, *supra*). Furthermore, it will be noted that, as a precedent for its recommended change in section 205 (f), the Commission mentions still other application cases, namely, applications of the railroads for authority to issue securities under section 20a.

So that, the statement quoted in Riss' brief from the Commission's 1938 legislative recommendations, that as the Act now stands it is necessary before new motor carrier operations can be undertaken to obtain a certificate of public convenience and necessity, or a permit, and that necessarily considerable time is entailed in public hearings, was not a construction by the Commission that Part II, as amended in accordance with its recommendations, required hearings on applications for certificates under section 207 (a). Nor did Congress, by enacting the amendments in accordance with the Commission's recommen-

dations, confirm or adopt any such construction. Principally featured in the 1938 legislative recommendations was the fact that the administration of the Motor Carrier Act had proved to be a most onerous task, particularly because of the vast number of carriers and brokers subject to the Act (Cf. *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 84; *Crescent Express Lines* v. *U. S.*, 320 U. S. 401, 404); that, not only was the work of regulation greatly expanded by the number of operators, but the fact that there was such a multitude of motor carriers meant that the average operator was a "little fellow", thousands of them being one-truck or two-truck operators having much need for instruction and for procedure made as simple and informal as possible; that often such small operators were caused hardship and loss by the delays necessitated by the hearing requirements of section 213 without any offsetting public advantage (pp. 3–4); that from the outset of the Motor Carrier Act the Commission had been swamped with business and unable to handle much of it with proper administrative dispatch; and that the present report was chiefly for the purpose of recommending and obtaining, if possible, procedural amendments enabling it to carry on its work more expeditiously and effectively.

Manifestly these were the things recognized and given effect by Congress in eliminating hear-

ings as a requirement both under sections 213[15] and 205 (e). In doing this, Congress followed the course of leaving to the Commission whether hearings were necessary to enable it to make the findings requisite to support its authorizations. There have been many cases where the Commission has deemed hearings necessary for that purpose. Equally there have been and will be many where hearings and other formal procedure may be omitted to the real advantage of all concerned.

Further supporting his premise that Part II requires a hearing on applications for certificates under section 207 (a) Riss cites *American Trucking Co.* v. *United States,* 326 U. S. 77; *United States* v. *Carolina Freight Carriers Corp.,* 315

[15] After section 213 was in substance embodied in section 5 (2) of Part I (54 Stat. 905, 906), a public hearing was required upon an application by a railroad, or railroad affiliate, to acquire a motor carrier. However, the requirement for a hearing in such cases resulted from the general provision in section 5 (2) (b) requiring "a public hearing in all cases involving" railroads, and, in 1949 (63 Stat. 5), that provision was amended by adding the words "unless the Commission finds that a public hearing is not necessary in the public interest." Whether acting under section 5 (2) or 207 (a), the Commission, in authorizing railroad subsidiaries to engage in motor carrier service, limits such authority to service auxiliary to or supplemental of the railroad's operations, and that character of service is best illustrated by the substitution of motor service for rail service in way-train operations. *Barker case,* 5 M. C. C. 9, 11. As the principle governing such coordinated rail-motor service become firmly settled, known and accepted by rail and motor carriers, it may be expected that there will be fewer protests or other reason for formal hearing.

U. S. 475, 490, and *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, in all of which hearings had been accorded and the questions were, taking the cases as a whole, whether the hearings had been fair and impartial and whether the Commission's decisions were supported by the record and impartially reached using sound criteria. Naturally once a proceeding is assigned for hearing, both sides must be afforded full opportunity to introduce evidence and testimony and the Commission must reach its decision giving consideration to all evidence before it; and in all cases it must apply the statute correctly, using sound criteria.

2. The rights of an applicant as well as those of protesting carriers in a section 207 proceeding rest on the statute, not the Constitution; and similarly, the Commission's duty in the proceeding is that placed with it by the statute

Whatever the right of an individual or company engaged in ordinary business to extend that business into wider fields without governmental interference or regulation, Riss' business is not of that sort. Even the right of an applicant for a "grandfather" certificate, who may have been engaged in transporting freight over the highways for many years prior to enactment of the Motor Carrier Act, was a right resting on that statute. Congress specified the measure of proof necessary to support such an application and conditioned the granting thereof on showing by an applicant that he had been in continuous op-

eration since June 1935 except for interruptions over which it had no control. *Gregg Cartage Co.* v. *United States*, 316 U. S. 74. *United States* v. *Maher*, 307 U. S. 148; *Crescent Express Lines* v. *United States*, 320 U. S. 401. The cases appear to hold that the certificate itself confers no property right. It is, therefore, difficult to determine what property right, if any, is involved in an application for a certificate. Any property right involved in such an application would at most be in the nature of an expectancy rather than a vested property right. The fact that the plaintiff had temporary authority to operate in no way creates a property right. By the terms of the Motor Carrier Act it does not even create a presumption that permanent authority will be granted. Section 210 (a), Motor Carrier Act, 49 U. S. C. 310 (a).

A certificate is an authorization to perform specified motor carrier service. When the Commission grants such authority it, in substance, grants a license or a privilege. *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280, 289.

In *Packard* v. *Banton*, 264 U. S. 140, a suit to enjoin the enforcement of a New York statute, requiring every person engaged in the business of carrying passengers for hire in any motor vehicle, the Supreme Court pointed to this distinction. In sustaining the statute it said:

> Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether includes the lesser power to condition and may justify a degree of regulation not admissible in the former (p. 145).

In *Viscegalia* v. *United States,* 24 F. Supp. 355, (S. D. N. Y., 1938) it was said that by the express terms of the Motor Carrier Act, the granting of an application for a certificate was a matter of discretion, and that the denial of an application for such a certificate even under the "grandfather" clause was not an invasion of a constitutional right, since carriers had no vested right to carry on business as carriers in interstate commerce without obtaining a permit or certificate as required by the Act. Such a certificate is a privilege which may be granted or withheld by the governmental body without violating the due process clause.

As regards the interests of intervening carrier competitors in a section 207 proceeding, it is clear that such interests rest wholly on the statute. *Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382; *Alton R. R.* v. *United States,* 315 U. S. 15 Compare *Pennsylvania R. R.* v. *United States,* 40 F. (2d) 921. The general policy of the law in this country is to encourage competition. How-

ever, the Interstate Commerce Act recognizes that unregulated competition in the transportation field may be wasteful and in its ultimate result harmful to the public. True, in delegating to the Commission the task of passing on applications for certificates, it was essential that Congress furnish a standard for the Commission's guidance, and this it did by laying down the standard of public convenience and necessity. This standard, particularly as coupled with the transportation policy, supplies entirely adequate criteria enabling the Commission to determine the essential findings and thus to judge of the need for hearing. Moreover, although Congress eliminated any requirement for hearing, it substituted a requirement that all interested parties be afforded opportunity to make representations to the Commission. As stated in the Commission's legislative recommendations "this will furnish a check on the need for a hearing." And it is evident that Congress did not believe that the Commission would use the discretion left with it otherwise than in the public interest and without careful consideration of the interest of all concerned.

3. The Procedure Act may not be read as entitling applicants for a certificate to a trial de novo if the Commission is not required to adjudicate applications on the record after opportunity for a hearing

Riss urges in effect that, as used in the Procedure Act, the words "adjudication required by statute to be determined on the record after oppor-

tunity for an agency hearing" include all proceedings other than those in which the parties upon review are entitled to a trial *de novo*. In support of this interpretation he cites Section 10 (e) (5) and 10 (e) (6) of the Procedure Act. These subsections provide the reviewing court shall "* * *, and B hold unlawful and set aside agency action, findings, and conclusions found to be * * *; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." If the Congress had any intention of placing in these subsections the interpretation that Riss urges, its language was most inept. It is a more familiar principle of statutory construction to assume Congress meant what it said. Obviously, these subsections have neither the content or purpose Riss suggests. Section 10 (e) (5) merely codifies and restates the substantial evidence rule. Attorney General's Manual on the Administrative Procedure Act, p. 109. And, by its very terms it makes a distinction between those proceedings in which hearings are held under sections 7 and 8 of the Procedure Act and other proceedings.

As far as section 10 (e) (6), quoted *supra,* is concerned, the Attorney General's Manual on the Administrative Procedure Act states at page 109:

"As to clause (6), the legislative history has resulted in misunderstanding. As S. 7 was introduced in the Senate, clause (6) was followed by a provision that 'The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing.' When S. 7 was reported by the Senate Committee, the quoted provision was omitted."

The Attorney General's Manual then points out that notwithstanding the deliberate omission, the subsequent legislative history repeats erroneous statements to the effect that clause (6) embodies the "established rule * * * [which requires a judicial] trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing." Sen. Doc. 248, 79th Cong., 2d Sess., p. 39; ibid p. 279. It is to be noted that Riss also cites these two references to the legislative history. However, it is obvious from the purposeful omission of that provision that Congress did not intend to create such a rule. With regard to this the Attorney General's Manual states: "To the contrary, the language of clause (6) 'to the extent that the facts are subject to trial de novo by the reviewing court' obviously refers only to those existing situations in which judicial review has consisted of a trial de novo."

Taken at its broadest Riss' interpretation would deprive administrative findings of any weight when they are subsequently called into question in the courts. Obviously, there are a great many determinations in which hearings are not required and which are not to be tried *de novo* in the courts.

In *Schenley Distillers Corporation* v. *United States,* 50 F. Supp. 491 (Del. 1943), the plaintiff made application for certificate of temporary authority under the Motor Carrier Act. The Commission, in denying the application, arrived at its conclusions from the allegations of the application without hearings or other proceedings. But the Commission did enter an order of denial. Though no hearing was required or held, plaintiff's application and the Commission's order constituted a record. And the Court held that the order of the Commission denying the certificate of temporary authority to plaintiff was a reviewable order by the Court as constituted under the Urgent Deficiencies Act.

In these two subsections Congress merely defined the quantum of review in two situations (1) where there was a statutory hearing, and (2) where there was a trial *de novo.* It did not change the methods of review but merely codified existing law.

Moreover, there is nothing in section 5 of the Procedure Act lending itself to Riss' interpre-

tation. Thus, as earlier mentioned, in the Senate Committee Report, to accompany S. 7, it is said, speaking of section 5:

> The numbered exceptions remove from the operation of the section even adjudications otherwise required by statute to be made after hearing. The first, where the adjudication is subject to a judicial trial de novo is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision * * * (p. 202, Senate Document 248, 79th Cong., 2d Sess.).

See practically identical statement in House Judiciary Committee Report, set forth in footnote 9, *supra.*

While most reparation orders of the Commission, though given but prima facie effect, are not subject to complete trial de novo, there are many functions of other agencies so subject to judicial retrial. The Procedure Act provides that "the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute". As to *any* order of this Commission, the jurisdiction for review thereof is vested in the three-judge courts provided for by 28 U. S. C. sections 2321–2325. While prior to the *Rochester Telephone Case,* 307 U. S. 125, negative orders of the Commission were not re-

viewable, the orders of the Commission of final force and effect which are now not so reviewable are indeed very few. Riss' argument seems to rest on the view that the three-judge court jurisdiction is not adaptable for review of orders save as there is a record made after formal hearing. But, aside from the provisions authorizing the grant of temporary operating authorities, involved in the *Schenley Distillers case, supra,* there other like provisions of the Interstate Commerce Act, such as section 1 (15), empowering the Commission to issue orders without notice or hearings; yet obviously the jurisdiction of three-judge courts extends to the review of orders issued under such provisions. *Peoria Ry. Co.* v. *United States,* 263 U. S. 528. Also mention should be made of the *Crescent Express case, supra,* involving an application for "grandfather" rights, which the District Court and this Court reviewed, although the only record was that made in connection with the informal procedure accorded.

Frequently plaintiffs, suing to set aside commission orders, omit supplying the District Courts with a copy of the records made in the Commission proceedings; and, in such case, they may not urge that the Commission's findings and orders are without support of substantial evidence. *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282. Yet the Commission's

reports and orders may and, of course, are reviewed by the courts to determine (1) whether the Commission acted within its statutory authority, (2) whether its report contained adequate findings and (3) whether it applied sound criteria. Even there are Commission orders reviewed by the courts where the only issue before the Commission and the only issue decided was a purely legal question, such, for example, as whether the carrier or company concerned was a carrier subject to the Act. *Union Stock Yards Co.* v. *United States,* 308 U. S. 213; *Pipe Line Cases,* 234 U. S. 548; *Valvoline Oil Co.* v. *United States,* 308 U. S. 141; *Champlin Refining Co.* v. *United States,* 329 U. S. 29. Doubtless there are still other decisions, showing that the three-judge court jurisdiction is adaptable for review of Commission orders of all kinds, with the exceptions noted in the *Rochester Telephone case, supra.*

4. The uniformity of procedure among agencies sought by the Procedure Act did not extend to the substituting of a requirement for hearing in an agency statute in place of amending provisions purposely enacted by Congress to eliminate any such requirement

Riss urges that unless Part II is construed as requiring hearings upon applications for certificates under section 207 (a) there will result a discriminatory application of the Procedure Act because certain other agency statutes require hearings upon applications for certificates of public convenience and necessity. If Riss means that such result would discriminate in favor of

the Commission, it should be pointed out that he has given no consideration to the very many rate and other kinds of cases in which the Commission is required to hold hearings. If he means that such result would discriminate against applicants for certificates from the agencies referred to, mention should again be made of the multitude of small motor carrier operators whose individual problems, it seems likely, are quite different from those of applicants for certificates from the Federal Power Commission or Civil Aeronautics Board.

The term "licensing" as defined in the Procedure Act covers licenses of many and varying types; and certificates of public convenience and necessity, when applied to the various agencies, covers operations of very different sorts and kinds. As above pointed out (p. 12, *supra*) the legislative history of the Procedure Act is replete with statements that sections 5, 7, 8 and 11 were intended to apply only to cases of adjudication in which Congress had by some other statute specifically required opportunity for an agency hearing. In fact, while Riss' brief (p. 23) in support of its argument here, quotes from Senator McCarran, the statement quoted is at best general, whereas the following goes directly to the point (Senate Document No. 248, 79th Cong., 2d Sess., p. 307):

Mr. McCarran. There is nothing in this bill which would interfere with such procedure.

Mr. Reed. I was a little uncertain, due, of course, to my lack of understanding of the bill and my lack of opportunity to give it the study which it requires.

Mr. McCarran. I wish to make it very clear to the Senator, because I appreciate the fact that he has had long experience in practice before the Interstate Commerce Commission, that there is nothing in this bill which would take away from the Interstate Commerce Commission anything in the way of functions.

Mr. Reed. And it would not change its method and rule of doing business when the method and rule is *founded on statutory authority?*

Mr. McCarran. That is correct.

Mr. Reed. I thank the Senator.

Mr. McCarran. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. We did not wish to disrupt or change anything that was *statutory;* and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure." [Emphasis supplied.]

Although the definition of "licensing" would include the "approval" or "permission" which the Commission grants applicants for temporary operating authority, yet it could hardly be urged that a requirement for hearing be read into section 210a. Equally, it is believed, the Procedure Act does not intend that such requirement be read into sections 207 (a), 205 (e) or 213 (now sec. 5 (2)).

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

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APRIL 1951.

APPENDIX "A"—STATUTES

Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U. S. C. sec. 1001, *et seq.*

Section 2 (c), 5 U. S. C. sec. 1001 (c):

> *Rule and Rule Making.*—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial stuctures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Section 2 (d), 5 U. S. C. sec. 1001 (d):

> *Order and Adjudication.*—"Order" means, the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Section 2 (e), 5 U. S. C. sec. 1001 (e):

> *License and Licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration,

charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Section 4, 5 U. S. C. sec. 1003:

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After notice required by this section, the agency shall afford in-

terested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted, a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective Dates.*—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5, 5 U. S. C. sec. 1004:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspection, tests, or

elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) *Notice.*—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of all parties or their representatives.

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

(c) *Separation of Functions.*—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as au-

thorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) *Declaratory Orders.*—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7, 5 U. S. C. Section 1006:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) *Presiding Officers.*—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act

shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) *Hearing Powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommended decisions in conformity with section 8 and (9) take any other action authorized by agency rule consistent with this Act.

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrel-

evant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.*—The transcript of testimony and exhibits, together with all papers and request filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8, 5 U. S. C. Sec. 1007:

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by Subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to sub-

section (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions

or recommended decisions of subordinate officers or to tentative agency decisions and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10, 5 U. S. C. Sec. 1009:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and

exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial action. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim Relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional

and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 11, 5 U. S. C. sec. 1010:

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established

and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed by utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommended legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

Interstate Commerce Act, Act of February 4, 1887, as amended August 9, 1935, c. 498 49 Stat. 543, 49 U. S. C. section 301, *et seq.*

Section 205 (d):

(d) So far as may be necessary for the purposes of this part, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposi-

tion, relating to any matter under investigation, as the Commission has in a matter arising under part I; and any person subpenaed or testifying in connection with any matter under investigation under this part shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under part I, unless otherwise provided in this part.

(e) In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

(g) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I: *Provided,* That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunc-

tion the Commission's taking of jurisdiction.

Section 207.

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Section 210 (a).

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such

temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority shall be granted thereafter.

APPENDIX "B"

TITLE 49—TRANSPORTATION AND RAILROADS

CHAPTER I—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART O—ORGANIZATION AND ASSIGNMENT OF WORK

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of May A. D. 1947.

There being under consideration the provisions of the Administrative Procedure Act, approved June 11, 1946 (60 Stat. 237), and particularly sections 2 to 9, inclusive, and sections 11 and 12 thereof; also those provisions of sections 17 and 205 of the Interstate Commerce Act (49 U. S. C. 17, 305), as amended, which require certain types of procedings to be determined on the record after opportunity for hearing.

The Commission hereby finds and determines that the general rule hereinafter set out concerning the assignment of its work is necessary and proper in order that the Commission shall be enabled to conduct its proceedings, and particularly those that are required to be determined on the record after opportunity for a hearing in such manner as will best conduce to the proper dispatch of business and to the ends of justice; and that such general rule is requisite for the

order and regulation of proceedings before the Commission, or assigned or referred to an individual Commissioner, or a board, or an examiner, as authorized by section 17 of the Interstate Commerce Act (49 U. S. C. 17), namely:

It is ordered, That

The order of the Commission as to assignment of work, entered June 8, 1942, pursuant to the provisions of section 17 of the Interstate Commerce Act (49 U. S. C. 17), as amended, codified as 49 CFR, Cum. Supp., Part O, is further amended by adding thereto, codified as paragraph § O.4a, the following additional provision namely:

§ 0.4a. *Matters reserved to the Commission for initial decision under sections 7 and 8, Administrative Procedure Act.*—All proceedings of the character in which, by provisions of the Administrative Procedure Act (60 Stat. 237), a hearing is required to be conducted in conformity with section 7, and a decision to be made as provided in section 8 of that act, shall be and are reserved to the Commission for initial decision, and for such purpose of initial decision may be assigned to a division, individual Commissioner, or board, as provided in section 17 of the Interstate Commerce Act (49 U. S. C. 17), by the general order of the Commission as to assignment of work, business, or functions. The following are excepted from the foregoing reservation: (a) proceedings required by section 205 of the Interstate Commerce Act (49 U. S. C. 305) to be submitted to joint boards; and (b) specific cases, or classes of cases, as to which the Commission may order exemption from the operation of this general rule. For the purpose of such initial

decision, the record in a proceeding so reserved shall be considered as certified to the Commission for initial decision when received by the Secretary of the Commission for filing in the docket. Such certification shall not be construed as relieving the officer from the necessity of submitting such recommended, tentative, or other type of report (consistent with the requirements of the Administrative Procedure Act) as the Commission shall previously have directed him to prepare in the proceeding. In individual proceedings involving rule making as defined in section 2 (c) of the Administrative Procedure Act, and in determining applications for initial licenses, the Commission, or the division, individual Commissioner, or board, or examiner, to which or whom a particular proceeding may have been assigned under section 17 of the Interstate Commerce Act (49 U. S. C. 17), will, as warranted by the second sentence of sec. 2 (a) of the Administrative Procedure Act (60 Stat. 237), determine (c) whether there shall be a tentative decision by the Commission, or by a division, individual Commissioner, or board, or examiner, to whom the proceeding may be referred or assigned, or (d) whether there shall be a recommended decision by designated responsible officers of the Commission; and (e) in any case the Commission, or the division, Commissioner, or Board, may find upon the record that due and timely execution of the functions of the Commission imperatively and unavoidably requires that a tentative or recommended decision be omitted in that case.

Effective date.—The foregoing amendment and general rule shall become effective June 10, 1947, upon publication thereof in the Federal Register, and shall apply to all proceedings, initiated after that date, of a character subject to the application of Sections 7, 8 and 11 of the Administrative Procedure Act (60 Stat. 237).

(24 Stat. 385, 25 Stat. 861, 40 Stat. 270, 41 Stat. 492, 493, 47 Stat. 1368, 54 Stat. 913; 49 U. S. C. 17.)

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1951

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IN THE

Supreme Court of the United States

October Term, 1950

No. 479

RISS & COMPANY, INC., A Corporation, *Appellant*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal from the United States District Court for the Western District of Missouri.

REPLY BRIEF FOR RISS & COMPANY, INC.

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REPLY BRIEF FOR RISS & COMPANY, INC.

The brief filed by the Interstate Commerce Commission argues that (1) the Administrative Procedure Act is applicable only if Section 207(a) in terms contained the word "hearing"; (2) a hearing on applications for certificates to motor carriers was required prior to 1938, but in that year Congress eliminated by amendment the requirement of a hearing; (3) section 10 of the Administrative Procedure Act does not assure to applicants for certificates of public convenience and necessity a trial *de novo* of the facts in the district courts even though there is no statutory provision for hearing before the Commission, and; (4) the right to operate as a motor carrier in interstate commerce under a certificate of public convenience and necessity is a "privilege" which the Commission may grant or withhold without hearing.

I.

The Commission urges that the phrase "required by statute" in section 5 of the Administrative Procedure Act limits the application of that section to those instances in which explicit statutory words granting a hearing can be pointed out. The Commission points to certain items of legislative history of the Administrative Procedure Act which it urges in support of this construction. (Brief for Commission, pp. 12-16). Precisely the same construction supported by these citations to legislative history was urged in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, and emphatically rejected by this Court, 339 U. S. 33, 48-50. It should be noted that the legislative history is replete with references indicating that the statutory hearing within the meaning of section 5 included not only those instances where the statute referred to a hearing, but also where a hearing was required by necessary construction of the statute.[1]

This argument in the brief of the Commission is all the more surprising since Commissioner Aitchison testified before the Committee on the Judiciary of the House that the draftsman of the Administrative Procedure Act was thinking "probably and naturally" of fights over certificates of public convenience and necessity in drafting the Act. Commissioner Aitchison stated:

> I would like to say this, with reference to the general approach of the bill . . . I think quite probably and naturally the draftsman was thinking of rate contro-

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[1] See *e.g. Administrative Procedure Act, Legislative History*, Sen. Doc. 248, 79th Cong. 2nd Sess. p. 285, n. 9; Statements in the reports of the Committee and on the floor that section 5 applies only where Congress has by some other statute required a hearing do not establish that Congress intended to distinguish between the phrase "required by statute" and "required by law". Similar expressions were used in connection with the phrase "required by law", where it was contained in the Administrative Procedure Act. Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong. 2nd Sess. p. 19; Hearings, Committee on the Judiciary, House of Representatives on Federal Administrative Procedure, p. 30; 92 Cong. Rec. 2155.

versies, or fights over certificates of convenience and necessity or grandfather rights, or possibly he had other agencies of the Government chiefly in mind, and he drafted his bill on the theory that the administrative functions to be dealt with are controversies between the agency and private people, or controversies between private people . . .

Hearings, Committee on the Judiciary, House of Representatives on Federal Administration Procedure, p. 49 (1945).

II.

The Commission further argues that prior to 1938 the Interstate Commerce Act required a hearing on an application for certificates of public convenience and necessity, but that in 1938 Congress eliminated the requirement for hearings in such cases. This argument of the Commission rests upon a construction of the legislative history and a theory never before advanced by the Commission in any case or proceeding prior to this appeal.

The Commission in 1938 made recommendations to Congress for changes in the Motor Carrier Act. Among the recommendations was that Congress empower the Commission to grant to motor carriers operating authorities for a period of 180 days in certain limited circumstances in its discretion and without hearings. The Commission urged that such authority was necessary because the Motor Carrier Act required that a public hearing be held on all applications for certificates of public convenience and necessity. Accordingly, Congress enacted section 210(a) of the Interstate Commerce Act which specifically authorizes the Commission to grant such operating authority for limited periods of time in emergency cases without hearings. The Commission in its brief relying on other statements in these recommendations now claims that Congress wholly eliminated the requirement of hearing in all applications for certificates of public convenience and necessity.

The argument now urged by the Commission is that it recommended and Congress enacted a specific section authorizing the Commission to issue temporary operating au-

thority under specific conditions without hearings, because of the requirement of a hearing in application cases and that the Commission simultaneously recommended and Congress enacted a provision which eliminated any requirement for a hearing on these applications for certificates of public convenience and necessity. This reduces the recommendations of the Commission and the amendments enacted by Congress to nonsense. Why adopt special statutory authority for the issuance of temporary operating authorities without hearings and simultaneously eliminate the requirement for hearings in applications under section 207(a)? The recommendation of the Commission predicated the request for the amendment upon the ground that a hearing was required under section 207(a). Why make such a request if the requirement of a hearing in section 207(a) was also to be eliminated? It should be noted that there was no change by these amendments in the provisions of section 207(a). Clearly such a construction of the legislative history of the Motor Carrier Act would attribute both to Congress and the Commission a wholly irrational purpose and intent.

It is significant that none of the excerpts from the Commission's recommendations quoted in the Commission's brief refer to an elimination of the requirement for a hearing in applications for certificates of public convenience and necessity. Indeed, aside from creating statutory authority for issuing temporary operating authority and temporary approval of operation of facilities by a proposed purchaser without hearings, the recommendations refer only to action under section 213, now repealed, and approval of the issuance of securities. Certainly such a fundamental change as the Commission now claims to have been made, would have called for some specific reference or discussion. Further, the recommendations quoted in the Commission's brief (pp. 22-23) clearly indicate that the amendment to section 205(f) now section 205(e) relating to notice and hearing was designed to take account of the special instances in which the amendments were requested specifically author-

izing action without hearings and in other types of action in which hearing would not otherwise be required.[2]

That an elimination of the necessity for a hearing was never intended or requested by the Commission or enacted by Congress is demonstrated by the testimony of Commissioner Eastman in connection with the Transportation Act of 1940, 54 Stat. 924. The Transportation Act of 1940 made a number of changes in the Interstate Commerce Act. Commissioner Eastman, who had presented the recommendations of the Commission to the House and Senate Committees in 1938, testified again in 1939 that a hearing was required on applications for certificates of public convenience and necessity covering operations of motor carriers. Commissioner Eastman stated to the Senate Committee on Interstate Commerce in 1939:

> Take the rule that certificates shall be given to motor carriers showing proof of public convenience and necessity. That a quasi-legislative work. Congress lays down the rule; the Commission considers the fact of a particular case and applies the rule to these facts. In doing that, the Commission employs judicial procedure. Inherently, however, what it does is legislative. It is acting as an arm of Congress, as a substitute for Congress in a way, but in its procedure, it acts like a court. In other words, it acts as a court for the protection of the public interest, and to prevent arbitrary, unprincipled action. The courts have held that in performing such duties the Commission must hold hearings and must be guided in its action by the record made at these hearings just as a court is. Hearings, Committee on Interstate Commerce of the Senate on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., 812 (1939).

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[2] The Recommendations of the Commission state:

"In view of the amendments above recommended, which would eliminate the necessity for public hearings in certain instances, and in view of the fact that the act in other instances permits, except for this paragraph, action without a public hearing, we recommend that the last part of the paragraph be changed . . ."

It is, therefore, absolutely clear that Commissioner Eastman, who had presented the recommendations of the Commission in 1938, realized that the amendments adopted by Congress had not eliminated the requirement of a hearing on applications for certificates. Moreover, it is also clear that in the twelve year period following the enactment of the amendments in 1938, the Commission adopted and acted upon the construction that the Interstate Commerce Act required a hearing on applications for certificates of public convenience and necessity. The Commission has not once denied a hearing on an application for a certificate of public convenience and necessity and, in fact, has consistently ruled that a full and fair hearing is required under the statute. *Leonard Bros. Transfer & Storage Co., Inc., Extension*, 48 M.C.C. 773; *Greyhound Corp., Extension*, 47 M.C.C. 103; *Texas & P. Motor Transport Co.*, 47 M.C.C. 753; *Somerset Bus Co., Inc., Extension*, 43 M.C.C. 543; *Public Service Interstate Transp. Co.*, 43 M.C.C. 599; *Columbia Motor Transport Co.*, 46 M.C.C. 69, 91; *Falwell Fast Freight, Inc., Extension*, 47 M.C.C. 743; *Calgary-Spokane Exp.*, 29 M.C.C. 746.

This Court has also consistently interpreted the Act as requiring a fair hearing on applications for certificates of public convenience and necessity. *Chicago, St. P., M. & O. R. Co.* v. *United States*, 322 U. S. 1, 4; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515; *American Trucking Associations* v. *United States*, 326 U. S. 77; *United States* v. *Texas & Pacific Motor Transport Co.*, Nos. 38 and 39, October Term, 1950, decided February 26, 1951.

It is, therefore, clear that this novel construction of the statute now advanced by the Commission is completely contrary to the consistent construction placed upon the statute by the Commission and this Court for more than twelve years. In fact, this contention on the part of the Commission is advanced for the first time in the brief filed in this Court in this case.

The effort made in the brief of the Commission despite the prior statements of the Commission to Congress, its own prior decisions and the decisions of this Court to deny the right of motor carriers to hearings points out the extent to which the agency will go to avoid compliance with the standards of adjudication contaned in the Administrative Procedure Act. The Commission failed in its attempt to obtain Congressional exemption from the Administrative Procedure Act, although it earnestly sought such an exemption. *Administrative Procedure Act, Legislative History*, Sen. Doc. 248, 79th Cong., 2d Sess., pp. 87-90. Having failed in this attempt, the Commission apparently hopes to obtain judicial exemption through new, restrictive and erroneous interpretations of the Interstate Commerce Act.

III.

It is urged in the Commission's brief that the effect of section 10 of the Administrative Procedure Act would not be to permit applicants for certificates of public convenience and necessity a trial *de novo* in the district courts even though the applicants were not entitled to a hearing and decision on the record before the Commission. The Commission argues that the statements in the House and Senate Committee reports and by the sponsors of the bill on the floor of the House which clearly state this intent and purpose of section 10 are merely "erroneous". The brief of the Commission overlooks the fact that Commissioner Aitchison testified in connection with the Administrative Procedure Act before the House Judiciary Committee that in cases where there is no record the court can take testimony de novo to inquire whether the order of the Commission is reasonable. Commissioner Aitchison stated in connection with judicial review of Commission cases:

> The court in the case of the Urgent Deficiencies Act does not go into the facts unless the party moving for a review puts the entire record before the court. And

then the court examines for the purpose of seeing whether the well known standards have been met; otherwise, it does not go into the facts.

"Now, with respect to other classes of cases where there is no record, there obviously we have quite a different situation and there seems to be a line of authority that in a case of that sort the court can take testimony de novo, to inquire whether the order of the Commission was a reasonable one.

Hearings, Committee of the Judiciary, House of Representatives on Federal Administrative Procedure, p. 59 (1945).

It is difficult to understand how the Commission in the light of its present argument can contend that there would be a record for review under the well known rule of substantial evidence. Clearly as Commissioner Aitchison points out that without such a review judicial trial *de novo* is required. Section 10 of the Administrative Procedure Act merely confirms these standards depending upon the existence of a statutory hearing and record made before the Commission.

IV.

The claim of the Commission (Brief, pp. 16, 28-31) that outright denial of any hearing upon the application for a certificate of public convenience and necessity would not have been an infringement upon either the statutory or constitutional rights of appellant is unsupportable.

The statutory right of appellant to a hearing in conformity with the provisions of the Interstate Commerce Act and Administrative Procedure Act has been heretofore discussed. The assertion that no hearing at all is necessary because "due process" is not required in the determination of the issues presented is predicated upon reasons not only novel to the point of being revolutionary in legal concept, but is untenable under long settled principles of constitutional interpretation.

The Commission rests its argument on the theory that Congress has the alleged legislative power to refuse licenses or certificates to all motor carriers in interstate commerce and, under the doctrine that the greater power includes the lesser, the setting up of standards under which certificates were to be granted confers no rights bu are merely matters of grace, without constitutional safeguard. The Commission therefore argues that the grant of the privilege being a mere matter of grace with Congress, that it remains so with the Commission when Congress prescribes the standard of public convenience and necessity upon proof of which the Commission was required by the Act to grant certificates to applicants.

Passing without argument—although it is subject to grave question from a constitutional viewpoint—the assumption that Congress could bar all motor vehicles from interstate commerce by simple legislative act—it does not follow from this that, in the absence of judicial review de novo of the facts, "due process" and constitutional safeguards necessitating a fair and impartial hearing in conformity with recognized judicial standards is not required in the exercise by the Commission of the delegated authority. In fact, almost without exception the situations in which "due process" has been held to be a constitutional requirement have been those in which a governmental authority has been engaged in the enforcement or administration of rules of law as applied to the individual. We find no cases heretofore where it has been even contended that because the law making authority possessed plenary power—not yet exercised—in the particular field of action, the constitutional requirement for "due process" in the application of the law as it stands is eliminated.

The Commission entirely overlooks the fact that the same situation existed insofar as Congress is concerned in the *Sung* case (339 U. S. 33). Congress possessed the plenary power to bar entry or require deportation of all aliens, without limitation. *The Japanese Immigrant Case, (Yamataya* v. *Fisher)* 189 U. S. 86, 96. It chose, however, to set

up standards for admission and deportation. In the application of those standards to specific cases the Immigration Service was entrusted with the authority to act under those standards. This court held in the *Sung* case, as it has held in all other cases, where like questions have been involved, that the fundamental constitutional safeguard of "due process" applied to the agency in the administration of the statutory powers. See also: *Bratton* v. *Chandler*, 260 U. S. 110; *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38; *Morgan* v. *United States*, 304 U. S. 1; *Kline* v. *United States*, 41 F. Supp. 577 (D. C. Neb. 1941).

V.

It is the claim of the Commission that, because of "the multitude of small motor carriers" (Brief p. 38), due process in the adjudication of their applications for certificates should not be afforded. It is a novel proposition that because motor carriers are small in comparison with railroads and airlines they are not equally entitled to the fundamental concepts of fair play in their regulation by the Commission. Constitutional rights are not merely for a few, but are equally for all. The right to continue its business is just as important to the smallest motor carrier as it is to the largest railroad, airline, or public utility. Indeed, we believe that if a preferential treatment is to be given, it should go to the small rather than the powerful.

We submit that this Court should reject the attempt to gain a judicial exemption from the Administrative Procedure Act at the expense of motor carriers subject to its regulation.

Respectfully submitted,

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APRIL 16, 1951.

Per Curiam Decisions.

No. 479. RISS & CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. Argued April 11–12, 1951. Decided April 16, 1951. *Per Curiam:* The judgment is reversed. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. *A. Alvis Layne, Jr.* argued the cause for appellant. With him on the brief were *John B. Gage* and *Wendell Berge*. *Daniel W. Knowlton* argued the cause and filed a brief for the Interstate Commerce Commission, appellee. Reported below: 96 F. Supp. 452.